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Supreme Court of the United States

OCTOBER TERM, 1966

ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant,*

v.

UNITED STATES OF AMERICA ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

The appellant, Illinois Central Railroad Company, appeals from a judgment of the United States District Court for the Northern District of Illinois sustaining orders of the Interstate Commerce Commission.

OPINIONS BELOW

The opinions of the District Court, majority and dissenting (App. 1, pp. 1a-33a), are not yet reported. The report and order of the Interstate Commerce Commission (App. 2, pp. 34a-159a) is reported at 327 I.C.C. 279.[1]

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[1] Because of the length of the District Court's opinions and the Commission's report, particularly the latter, they are printed in a separately bound volume as appendices 1 and 2 to this Statement and the jurisdictional statements of appellants St. Louis Southwestern Railway and Monon Railroad.

JURISDICTION

This action was brought by the appellant in the District Court for the Northern District of Illinois under 28 U.S.C. §§ 1336, 1398, 2284 and 2321-25, and Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009, to enjoin and set aside orders entered by the Interstate Commerce Commission in its Finance Dockets Nos. 21755, 21892 and 21980.

In accordance with the applicable statute, 28 U.S.C. § 2325, a three-judge court was convened. With one judge dissenting that court entered on August 4, 1966, its judgment affirming the orders of the Commission (App. A, p. 36, *infra*). A notice of appeal was filed by appellant in the District Court for the Northern District of Illinois on September 1, 1966.

Jurisdiction of this Court to hear this appeal is conferred by 28 U.S.C. § 1253. The following cases sustain the jurisdiction of this Court: *A. L. Mechling Barge Lines Inc.* v. *United States,* 368 U.S. 324; *Dixie Carriers Inc.* v. *United States,* 351 U.S. 56; *ICC* v. *Mechling,* 330 U.S. 567; *Skinner & Eddy Corp.* v. *United States,* 249 U.S. 557; *United States* v. *Merchants & Mfrs. Traffic Ass'n,* 242 U.S. 178.

STATUTES INVOLVED

Section 5(2)(a)(i) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(a)(i), provides in pertinent part:

> "It shall be lawful, with the approval and authorization of the Commission, . . . for any carrier . . . to acquire control of another through ownership of its stock or otherwise . . . ."

Section 5(4) of the Interstate Commerce Act, 49 U.S.C. § 5(4), provides:

> "(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any

> transaction within the scope of subdivision (a) of paragraph (2) of this Section, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5) of this section, the words 'control or management' shall be construed to include the power to exercise control or management."

The full text of Section 1(3)(b) and Section 5(2) of the Interstate Commerce Act, 49 U.S.C. §§ 1(3)(b) and 5(2), are set out in Appendix B to this Statement, pages 37-40, *infra*.

QUESTIONS PRESENTED

The Interstate Commerce Commission consolidated for hearing and decision separate applications under Section 5(2) of the Interstate Commerce Act of two railroads, the Missouri Pacific and the appellant, the Illinois Central, for approval and authorization of the acquisition of control of a third railroad, the Chicago & Eastern Illinois. It also consolidated in the same proceeding an investigation instituted by it on its own motion to determine whether one of the applicants, the Missouri Pacific, had already acquired control of the C. & E.I. without Commission approval, in violation of Section 5(4) of the Act. The Commission found that the Missouri Pacific had illegally acquired the power to control the C. & E.I. but concluded that the

violation was mitigated and that in any event it ceased when the Missouri Pacific placed the C. & E.I. securities whose ownership gave it the power of control in a voting trust. It said that it "was not free to summarily deny Missouri Pacific's application" under Section 5(2) because of its violation of Section 5(4). The Commission granted the Missouri Pacific's application and approved and authorized its acquisition of control of the C. & E.I. It denied appellant's application. The court below sustained the Commission's order. The questions presented are:

1. Whether the Commission must consider the merits of a railroad's application for approval and authorization of acquisition of control of another railroad even though the applicant has already acquired control without Commission approval or authorization, in violation of Section 5(4) of the Act, or whether in such circumstances it has the power to deny the application under Section 5(2) of the Act solely on the ground of the antecedent violation.

2. Whether the Commission's conclusion that there were factors mitigating the Missouri Pacific's illegal acquisition of power to control the C. & E.I., notably the subsequent creation of a voting trust of the securities whose purchase gave it such power, and that therefore the law violation was outweighed by purported public interest considerations under Section 5(2) of the Act was correct as a matter of law and rested upon adequate findings, supported by substantial evidence, that provide a rational basis for the conclusion reached.

3. Whether the voting trust established by the Missouri Pacific was irrevocable and thus effectively

insulated the Missouri Pacific from control of and power to control the C. & E.I.

4. Whether the District Court erred in its conclusion that the Commission did not rely upon the assumed irrevocability of the voting trust established by the Missouri Pacific in finding insulation of the Missouri Pacific from control of the C. & E.I. and that therefore it, the court, need not decide the question whether the trust was irrevocable as a matter of law but could sustain the Commission by determining merely that as a practical matter the trust was not revoked and was not likely to have been revoked.

5. Whether the District Court erred in its conclusion that the Commission properly refused to reopen the record to receive evidence concerning (a) the Missouri Pacific's acquisition of additional securities of the C. & E.I., which increased the measure of its control of that railroad, while the proceeding on its application was pending and (b) the significant improvement in the financial and operational health of the C. & E.I., whose debility as depicted in the stale record on which the Commission's decision was based underlay the Commission's conclusion that absorption of the C. & E.I. by another railroad, the Missouri Pacific, would be in the public interest.

STATEMENT

The Chicago & Eastern Illinois Railroad is a bridge and terminal railroad whose lines run south from Chicago to East St. Louis and Thebes, Illinois, on the west and to Evansville, Indiana, on the east. On a map its lines resemble an inverted Y.

The C. & E.I., which in its present corporate form is the product of a bankruptcy reorganization in 1941,

was in financial trouble in the 1950's and the very early 1960's. Its strategic location made it at that time attractive, as a prospect for merger or control, to financially sounder, long-haul roads that wanted access or additional access to the important Chicago gateway.

One such road was the Missouri Pacific Railroad. It does not enter Chicago over its own lines but instead terminates at St. Louis, which is on the C. & E.I. line near the southern end of the west branch of the inverted Y. It had negotiated for a merger with the C. & E.I. from July 1959 until December 1960, and even after its final offer was rejected it did not give up the idea of an ultimate merger. (App. 2, p. 111a). The Louisville & Nashville Railroad also engaged in merger discussions with the C. & E.I. in 1960 and into August 1961. Other roads that were interested were the Chicago & North Western, the New York Central and the St. Louis-San Francisco (Tr., ICC Fin. Dkts. 21755 et al., pp. 2285, 4380).

On August 11, 1961, the Missouri Pacific acquired, without approval or authorization of the Interstate Commerce Commission, certain securities of the C. & E.I. It paid 40 per cent more than the market price for them. (App. 2, pp. 110a-114a). These securities included enough of the C. & E.I.'s Class A Stock to give the Missouri Pacific, as the Commission later found, power to control the C. & E.I. (App. 2, pp. 83a-85a). "Power to exercise control" is by statutory definition the equivalent of the "control" that one rail carrier is specifically forbidden by Section 5(4) of the Interstate Commerce Act to acquire over another without the *prior* authorization and approval of the

Commission.[2] The C. & E.I. thereafter had no further merger discussions with any other railroad.

Having thus acquired statutory "control" of the C. & E.I. illegally, the Missouri Pacific five weeks later applied to the ICC for approval and authorization of its acquisition of control of that carrier.

Subsequently this appellant, the Illinois Central Railroad, which had no ownership interest in the C. & E.I. at the time and has none now, filed an application with the ICC for authorization to acquire control of the C. & E.I.

These two applications were consolidated by the ICC for hearing and decision. Also consolidated was an investigation instituted by the ICC on its own motion to determine whether the Missouri Pacific or the Louisville & Nashville or both had illegally acquired control of the C. & E.I. The L. & N. also had undertaken, soon after the Missouri Pacific's major initial purchase, a program of purchasing C. & E.I. securities with a view to controlling the carrier. (App. 2, p. 82a). It filed an application for approval of such control but withdrew it and participated in the proceeding as an advocate of the position that as a condition of its approval of any acquistion of control of the C. & E.I. the Commission should compel the sale to the L. & N. of the eastern branch of the C. & E.I.'s inverted Y line, terminating at Evansville, Indiana. (App. 2, p. 36a). The L. & N. would thereby obtain a direct entry into Chicago from the points it serves in the Southeast.

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[2] See Interstate Commerce Act §§ 1(3)(b), 5(4), 49 U.S.C. §§ 1(3)(b), 5(4).

The consolidated proceeding went forward expeditiously through the hearing stage. Through much of this stage the Missouri Pacific prosecuted its application as the holder of both legal title to and beneficial interest in the C. & E.I. securities that gave it control of that carrier. In April 1962, eight months after it obtained the securities and not long before the hearing was to conclude, the Missouri Pacific placed its securities in a voting trust of which the Marine Midland Trust Company of New York was trustee. The L. & N. had created a similar trust, with a different trustee, of its C. & E.I. securities at the time it first began purchasing them. (App. 2, pp. 82a-84a).

The hearing examiner recommended that the Missouri Pacific's application be granted and that the Illinois Central's application be denied, and that the condition of approval proposed by the L. & N. should not be imposed. He found also that neither the Missouri Pacific nor the L. & N. had acquired control of the C. & E.I. illegally.

The record on which the examiner's recommendation that the Missouri Pacific be authorized to have control of the C. & E.I. was based was made early in 1962, and the latest data it contained were from 1960 and 1961. The finding of the examiner that it would be in the public interest for the C. & E.I. to be taken over by the Missouri Pacific was based in very large part upon the C. & E.I.'s financial condition, which was precarious in 1960 and 1961. (App. 2, pp. 104a-109a).

After the examiner issued his report and exceptions to it had been filed, the Illinois Central and the Commission's Bureau of Inquiry and Compliance filed petitions to reopen the hearing. In these it was

alleged that the purchases of C. & E.I. securities by the Missouri Pacific and investment banker associates subsequent to the close of the hearing had substantially increased the carrier's holdings and thus enhanced its power to control the C. & E.I. It was alleged, indeed, that if convertible bonds included in the holdings were converted, the holdings would amount to 51 per cent of the C. & E.I.'s voting stock. In addition, the Chicago & North Western Railway, an intervenor in the proceeding, filed a petition to reopen for further hearing, alleging that, on the basis of recent reports, the financial situation of the C. & E.I. had significantly improved. A similar petition was later filed by another carrier, the St. Louis Southwestern Railway.

The Commission issued its report and the order here challenged on February 16, 1965. It agreed with the hearing examiner that acquisition of control of the C. & E.I. by the Missouri Pacific should be authorized and approved as in the public interest and the application of the Illinois Central should be denied. Its judgment that it would be in the public interest for the C. & E.I. to be controlled by another railroad was predicated on the same figures that were before the examiner, which were by this time four and five years old. (App. 2, p. 96a). The Commission took no notice of more recent figures contained in reports of the C. & E.I. filed with the Commission to which the Commission's attention was invited by the Chicago & North Western in its petition to reopen, which had been denied.

The Commission found in favor of the Missouri Pacific and against the Illinois Central on the principal ground that the "end-to-end" affiliation of the C. & E.I. with the Missouri Pacific, giving the latter access to

Chicago for the first time, was preferable to the Illinois Central's proposal whereunder uneconomical duplicative facilities of two somewhat parallel roads would have been eliminated and the C. & E.I. would have been preserved as an independent bridge carrier serving impartially the long-haul carriers in the Chicago area. (App. 2, pp. 42a-50a). In its discussion of the relative merits of the two applications the Commission did not advert to the fact that, as it found in a subsequent portion of its report, the Missouri Pacific had illegally acquired power to control the C. & E.I.

The Commission, differing with the examiner, imposed in its order of approval substantially the condition advocated by the L. & N., requiring good faith negotiations looking toward the sale of the Evansville line to the L. & N.

The Commission also disagreed with the hearing examiner with respect to the unauthorized acquisition of control of the C. & E.I. by the Missouri Pacific. It found that the extent of the Missouri Pacific's interest in the C. & E.I. acquired without Commission approval was such as to give it power to control the C. & E.I., and that the Missouri Pacific therefore had violated Section 5(4) of the Act. (App. 2, pp. 83a-85a). It found, however, factors that in its view mitigated this violation of the law. These included particularly the placement of the securities in a voting trust in April 1962. The trust was found to have effectively insulated the Missouri Pacific from control of the C. & E.I. In substantial part this finding rested upon the Commission's legal conclusion, based solely upon the terms of the trust instrument itself, that the trust was irrevocable during its ten-year term. (App. 2, p. 86a). (Because the L. & N. placed its C. & E.I. securities in

trust as soon as they were acquired, it was found not to have obtained control illegally.)

The Commission said that "even though we find a statutory violation through the unlawful acquisition of control, we are not free to summarily deny Missouri Pacific's application." (App. 2, p. 89a). It concluded that the public interest considerations that it had theretofore recited in its comparison of the applications of the Missouri Pacific and the Illinois Central "overwhelmingly favor approval of the Missouri Pacific's control of [the C. & E.I.] . . . , notwithstanding the Section 5(4) violations" (App. 2, p. 90a). Because of its finding that the voting trust effectively insulated the Missouri Pacific from control of the C.&E.I., it declared that the issues concerning further securities purchases by and on behalf of the Missouri Pacific, raised in the petitions for reopening of the Illinois Central and the Bureau of Inquiry and Compliance, were moot. (App. 2, p. 89a).

On consideration of the complaints of this appellant and others asking that the Commission's order be enjoined and set aside, the District Court sustained the action of the Commission. So far as relevant to the questions raised on this appeal, the court

(1) held that the Commission acted within its discretion in declining to deny the Missouri Pacific's application because of its violation of Section 5(4);

(2) held that it was unnecessary to decide whether as a matter of law the voting trust arrangement created by the Missouri Pacific was irrevocable; that the Commission had not regarded the legal irrevocability of the voting trust as "critical" to its conclusion; and that in any event the voting trust was sufficient, in

the opinion of the court, to insulate the Missouri Pacific from control because of asserted "realities of the railroad business" and without regard to the law of trusts;

(3) held that the Commission could properly deny, on the basis of the existence of the Missouri Pacific's voting trust, the Illinois Central's petition to reopen the record to receive evidence of additional purchases of C. & E.I. securities by the Missouri Pacific and associated brokerage firms, even though the court correctly found that for a substantial period some of such securities were within the dominion of the Missouri Pacific outside of the voting trust, and

(4) held that the Commission was not bound to reopen the record to receive current data as to the financial and operational condition of the C. & E.I. despite the heavy reliance by the Commission upon the distress of the C. & E.I. as depicted by a record that the court acknowledged was "unquestionably stale."

One member of the three-judge court dissented. He would have held that the voting trust was legally revocable, that the Commission acted upon the erroneous legal conclusion that the trust was irrevocable and that the case should be remanded to the Commission for reconsideration in light of a corrected legal construction of the trust. The dissenting judge also disagreed with the majority's holding that the Commission need not consider the Missouri Pacific's further acquisition of C. & E.I. securities and stated that upon the remand the Commission should also be directed to reconsider the financial and operational condition of the C. & E.I. in light of current data.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Consolidation of the railroads of this country, by mergers, acquisitions of control and other devices, is going forward rapidly. The congressional design set forth in the various subsections of Section 5 of the Interstate Commerce Act is to permit such consolidations only where they are authorized and approved in advance by the Interstate Commerce Commission. This design reflects a Congressional determination that the public policy embodied in the statute will best be served if the approval of the Commission is sought *before* and not *after* the transaction forbidden by the statute is consummated. In the present case a railroad by a deliberate violation of the Congressional mandate, and by an artful choice of timing and method of acquisition, was able to obtain, without prior Commission approval, a preemptive position as against other potential purchasers with respect to the control of another railroad. The Interstate Commerce Commission has permitted the railroad to retain and to enjoy the fruits of its unlawful conduct. The case presents substantial issues with respect to whether in so dealing with this situation the Commission properly interpreted its statutory authority and whether its findings and conclusions satisfy applicable legal standards. The resolution of these issues is of the utmost importance to the administration of Section 5 of the Interstate Commerce Act.

I

The Interstate Commerce Commission found that for an eight-month period—during which the Missouri Pacific filed, and presented evidence in support of, an application for approval and authorization of its

acquisition of control of the C. & E.I.—the Missouri Pacific had power to control the C. & E.I. From this fact the Commission concluded, as it had to conclude, that throughout the period the Missouri Pacific was in violation of Section 5(4) of the Interstate Commerce Act.

Nevertheless, the Commission declared that "even though we find a statutory violation through the unlawful acquisition of control, we are not free to summarily deny Missouri Pacific's application" under Section 5(2) of the Act for approval of its acquisition of control of the C. & E.I. (App. 2, p. 89a).

In thus holding itself powerless to deny at the threshold the application of a law violator that in substance seeks Commission ratification of action illegally taken, rather than advance approval of action to be taken, the Commission ruled in a manner contrary to this Court's decision in *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115. Like this case, the *Gilbertville* case involved the interplay of Sections 5(2) and 5(4) of the Act. The Commission there had found a violation of Section 5(4) and on that basis denied an application under Section 5(2). This action was objected to by the applicants on the ground that, on the facts of the case, the Commission must have been applying a rule that made a Section 5(4) violation an automatic bar to approval of a Section 5(2) application and such a rule was not legal. This Court held that the applicants were wrong in their characterization of the Commission's action as imposing an automatic bar, but at the same time it made clear that under the governing statutory provisions the Commission was free to impose such a bar. The Court held that "an automatic rule is not neces-

sarily arbitrary." Indeed, the Court spoke approvingly of a rule of automatic disqualification of a Section 5(4) violator, saying that "to approve a merger in the face of a § 5(4) violation may encourage others whose merger may or may not be consistent with the public interest to either present the Commission with a fait accompli or avoid its jurisdiction altogether." The Court quoted from the Commission's own opinion in *Central of Georgia Ry. Control,* 307 I.C.C. 39, 44 (1958), where the Commission said that, if the practice of presenting it with a *fait accompli* were encouraged, "'our administration of the statute in the public interest would be seriously hindered, if not defeated.'" 371 U.S. at 128.

Commission control of carrier unifications was introduced into the Interstate Commerce Act by the Transportation Act of 1920.[3] Those provisions, the forerunners of what is now Section 5(2), were not wholly effective to prevent unauthorized consolidations, and it was for precisely this reason that Section 5(4) was added to the Interstate Commerce Act by the Emergency Railroad Transportation Act of 1933.[4] See *Gilbertville Trucking Co.* v. *United States, supra,* at 122-25.

It is clear that, under these complementary provisions, the Commission does have power to deny a Section 5(2) application on account of an applicant's violation of Section 5(4). The Commission itself has recognized that the intent of these provisions is to

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[3] Transportation Act of 1920, § 407, 41 Stat. 480, adding §§ 5(2)-(8) to the Interstate Commerce Act.

[4] Emergency Railroad Transportation Act of 1933, §§ 201-02, 48 Stat. 217.

assure achievement of the congressional purpose that the Commission "pass upon 'proposed' acquisitions of control prior to their consummation, including the justness and reasonableness of the terms upon which such control is to be acquired," *Central of Georgia Ry. Control, supra,* at p. 44. It is not consistent with this purpose to read the statute as withholding from the Commission the authority to determine that a deliberate violation of Section 5(4) is in itself sufficient reason for the denial of an application under Section 5(2).

The Commission's contrary position as taken in this case is in flat conflict with the reading of its organic statute by the other principal federal regulatory agency that administers a statute under which carrier unifications can be authorized and thereby immunized from the antitrust laws.

Section 408 of the Federal Aviation Act, 49 U.S.C. § 1378, and of its predecessor the Civil Aeronautics Act, derives from Section 5 of the Interstate Commerce Act.[5] It provides that "it shall be unlawful" without the approval of the Civil Aeronautics Board for air carriers to enter into substantially the same unification transactions that are forbidden by Section 5(4) of the Interstate Commerce Act to carriers under ICC jurisdiction. Some years ago the CAB laid down the general rule (with an exception only for "exceptional circumstances") that whenever it had reason to believe that an applicant for approval under Section 408 had, at the time of his application, violated the section by having acted without prior Board approval "the application will be held in abeyance

[5] See Acquisition of Marquette by TWA, 2 C.A.B. 409, 412 (1940).

until either the alleged violation has been voluntarily terminated or the completion of a proceeding to determine the existence of the violation and, in the event a violation is found to exist, until the violator has taken required corrective action." *Sherman, Interlocking Relationships and Stock Ownership,* 15 C.A.B. 876, 881 (1952). (The CAB has held that the voluntary creation of a voting trust does not satisfy these requirements. See pp. 22-23, *infra.*) The Board declared that "this mode of processing [is] an appropriate one under" its statute. The President of the United States, who has final authority over air carrier unifications that involve the transfer of certificates authorizing the operation of foreign routes, has taken the same view as the Board.[6] In a case in which an applicant carrier had illegally acquired control of another, the Board submitted to the President an order approving the acquisition by the controlling carrier of the assets of the other, on the ground of "important public interest factors," including a reduction in government subsidy. The President determined that the acquisition should be disapproved because of the prior violation of Section 408. The Board quoted him as believing that air carrier "mergers should be accomplished in full accordance with the requirements of the Civil Aeronautics Act, including the requirement of advance approval of any acquisition of control." *Eastern-Colonial, Acquisition of Assets,* 18 C.A.B. 453, 455-56 (1954).

In sustaining the Commission's order, the court below said merely that the Commission need not debar

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[6] The President's authority is conferred by Federal Aviation Act § 801, 49 U.S.C. § 1461.

a Section 5(2) applicant because of a Section 5(4) violation. This is not responsive to the point made here and below that the Commission was wrong as a matter of law in disclaiming the power to disqualify an application without consideration of the nature of the violation or of the benefits asserted to flow from the transaction of which approval is sought. This Court should make clear to the Commission that it has the disclaimed power. If it were made clear to the Commission that it possessed this power, it would then be in a position to determine whether to adopt a simple prophylactic rule of disqualification of law violators, which would in turn avoid the kind of difficulties that confronted both the Commission and the reviewing court in this case.

II

Having decided that it had no authority to deny the application of the Missouri Pacific solely on the grounds of its prior violation of Section 5(4), the Commission then concluded that the violation was not "flagrant" but was mitigated by factors that justified the Commission in determining that public interest considerations required the approval of the application. We submit that there is no rational support in substantial evidence or in the Commission's subsidiary findings or in law for the conclusion that there were factors mitigating the violation that justified the Commission in approving the application.

It is perfectly clear on the record that the Missouri Pacific's violation of Section 5(4) was willful and flagrant in every sense in which those terms are meaningful. No more is needed to demonstrate this than the hearing examiner's findings adopted by the Commission. The Missouri Pacific had negotiated with the C. & E.I. concerning a merger for a year and

a half beginning in July 1959. It did not give up the idea of such a merger even after its final offer was rejected in December 1960. It purchased the block of securities that gave it power to control the C. & E.I. on August 11, 1961, paying a premium. The purchase clearly was no mere investment. Three days after it was made, the president of the C. & E.I. was advised that the Missouri Pacific was going to file an application for approval of its acquisition of control. (App. 2, pp. 111a-112a). The Missouri Pacific was well aware that one railroad cannot control another without Commission approval and authorization, and it was as well able as the Commission to calculate the power over the C. & E.I, that the securities included in the August purchase gave it. This was no instance of good faith action based on mistaken understanding of the facts or the applicable law, bad advice or innocent motives. It was action altogether comparable to that of another railroad which the Commission, shortly before the Missouri Pacific acted, had condemned in *Central of Georgia Ry. Control,* 307 I.C.C. 39 (1958).

At the very least the illegal acquisition had the intended effect of chilling other carriers' interest in the C. & E.I. and thus preventing the working out, for the Commission's consideration, of what might have been a more rational and desirable consolidation. It thereby thwarted fulfillment of Congress' clear purpose in enacting Section 5 and adding to its provisions over the years.

Aside from the creation of the voting trust, which is discussed below, all that the Commission said that there was in the way of mitigation of the Missouri Pacific's violation is that, having applied belatedly for Commission approval and thus being placed on its

good behavior, the Missouri Pacific forbore during the period of its outright ownership of the C. & E.I. securities to exercise to the full the power of control that it enjoyed. This is not surprising and scarcely relevant. For the fact remains that the power achieved by the Missouri Pacific by its purchase of C. & E.I. securities on August 11, 1961, was amply sufficient for its purpose. This was to put itself in a position to veto any other possible merger, sale or lease of the C. & E.I. properties, so that both the management of the C. & E.I. and the managements of other railroads would know that merger negotiations or even studies would be fruitless.

This situation continued even after the voting trust was created. By the C. & E.I.'s charter the assent of two-thirds of the Class A stock outstanding is necessary for approval of certain transactions, including consolidations and mergers, leases and sales. The Commission found, in view of the historic failure of 10 per cent or more of the Class A stock to be voted, that the not quite one-third of the Class A stock held by the Missouri Pacific was enough "to block stockholder assent to, and thereby prevent [the C. & E.I.] from accomplishing various corporate transactions, such as mergers, leases and sales." (App. 2, p. 84a). Stock in that amount was in the trust. The trust agreement provided that the trustee "shall not vote or assent in respect of any such securities for the acquisition of control" of the C. & E.I. by the Missouri Pacific or any other company "except as may be permitted or authorized by the Interstate Commerce Commission or required by a court of competent jurisdiction."

As a practical matter this direction not to vote on an "acquisition of control of the C. & E.I.," taken together with other circumstances, served to maintain the Missouri Pacific's veto. This fact was not altered by the clause of the voting trust permitting the trustees to vote on a control transaction with the authorization of the Interstate Commerce Commission or by direction of the court. Whatever meaning is to be given to that qualification the fact remains that one-third of the Class A stock of the C. & E.I. was in substantial measure sterilized by the voting trust and this necessarily severely limited the freedom of the C. & E.I. to negotiate with other interests on matters relating to control and as a practical matter effectively discouraged other persons from attempting to negotiate lawful arrangements with the C. & E.I. looking toward the acquisition of control.[7]

The Commission did not consider or appraise the preemptive effect of the Missouri Pacific's unlawful acquisition of control in determining the character of the violation. The Commission appears to have regarded the creation of the voluntary voting trust as of primary if not decisive importance in mitigating the offense without giving any consideration to whether the voting trust effectively did or could terminate this effect of the unlawful acquisition. Nothing in its findings or conclusions provides a rational explanation for the Commission's failure to give weight to this aspect of the unlawful acquisition.

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[7] It might also mean that the trustee could vote in case it was authorized or permitted to do so by the ICC or required to do so by a court, but we do not understand in what circumstances either of those things would happen.

The action of the Commission in giving overriding importance to the voluntary creation of the voting trust should be contrasted with the position that the Civil Aeronautics Board has taken in its administration of a statutory provision that is similar to Section 5 of the Interstate Commerce Act. The Civil Aeronautics Board has wisely declined to embark upon the pointless exercise of grading and classifying degrees of culpability. In adopting its rule that a transaction by which Section 408 of the Federal Aviation Act has been violated must be undone before an application under Section 408 will be considered, the Board stated that this rule "will exclude any consideration . . . of circumstances in mitigation of violations." *Sherman, Interlocking Relationships and Stock Ownership,* 15 C.A.B. 876, 881 (1952).

Moreover, the Board has lately refined this doctrine in the specific area of voting trusts. Over the years the Board had directed or approved the creation of severely restrictive voting trusts, to be liquidated in a specified period, as a means of redressing pre-existing violations of Section 408.[8] Persons subject to the Board's jurisdiction erroneously inferred from these decisions that the Board would regard the same kind of restrictive voting trusts as an insulation from control in the first instance, so that an application for approval of an acquisition of control would be considered if only the securities by which control had already been acquired were held in a voting trust. In 1964, when such a case was presented to it, the Board said "that in the future it will not view the creation of a voting trust as an excuse for failing to seek Board

[8] See, *e.g.*, Hughes-TWA-Atlas-Northeast, Common Control, 27 C.A.B. 155 (1958).

action on relationships otherwise subject to Section 408 . . . in advance of the establishment of the relationship or as a ground for waiver of the *Sherman Doctrine.*" *National-Maytag,* CAB Order No. E-20701, April 15, 1964, p. 2. See also *West Coast Air Lines, Inc., Enforcement Case,* CAB Order No. E-22448, June 1, 1965.

The District Court in its opinion was unable to provide any rational explanation for the Commission's conclusion that the violation here involved was not sufficiently flagrant or serious to give it any significant weight in relation to the assumed public interest advantages of granting the Missouri Pacific application. The court began by contrasting the case of a flagrant violation of Section 5(4) "in open defiance of Commission authority" with a case in which the applicant acted in good faith but committed a technical violation. The court did not, however, suggest that the actions of the Missouri Pacific fell in the latter category. The court then observed that in the case of a flagrant violation "the public interest may require denial of a Section 5(2) application" while in the case of a good faith but technical violation "the public interest in strict enforcement of Section 5(4) may be comparatively small". (App. 1, pp. 6a-7a). Then in apparent response to the argument that the Missouri Pacific violation was flagrant the court said that "a mere similarity in the degree of flagrancy of violation between cases does not dispose of the problem since the public benefits of control may be greater in one case than in another." (*Ibid*). The court said that the Commission "applies a balancing test". (App. 1, p. 6a). The court was unable, however, to indicate even in general terms the legal standards that should apply in determining whether the balance in a particular case

has a rational foundation and was, therefore, in no position to determine whether the Commission in this case had applied a proper standard. In short, the court suggested no legal restrictions on what the Commission may do in blessing violations of Section 5(4) but appeared to leave that crucial question entirely to uncontrolled administrative discretion.

III

The Commission made findings as to the terms of the Missouri Pacific's trust that govern the exercise by the trustee of the stock's voting privileges. It found explicitly that "the trust, during its term, is irrevocable, and is to remain effective until the occurrence" of certain events specified in the trust instrument. (App. 2, p. 86a). It concluded, on the basis of these terms, that the trust was adequate to divest the Missouri Pacific of power to control or manage the C. & E.I. in a common interest with the Missouri Pacific. Therefore, it concluded ultimately that the Missouri Pacific's violation "ceased upon effectuation of the trust . . . ." (App. 2, p. 89a).

The Commission did not look beyond the terms of the trust except to say that there was no evidence that the trustee had acted inconsistently with them; by carrying out the terms of the instrument, the Commission said, the trustee had successfully insulated the Missouri Pacific from power to control the C. & E.I. (App. 2, p. 89a).

Plainly irrevocability of the trust was essential to the Commission's ultimate conclusion since a trust that could be revoked by the Missouri Pacific at any time would afford no insulation at all. By the terms of the instrument the trust purported to be irrevocable during its ten-year term, and the Commission's inquiry

stopped there. It could not properly do so for as a matter of law the trust was revocable by the Missouri Pacific.

The general rule is that where a settlor is the sole beneficiary of a trust he may terminate the trust at any time. That is the rule of Section 339 of the Restatement of Trusts.[9] And Comment *a* to that section states that the rule applies "even though it is provided in specific words by the terms of the trust that the trust shall be irrevocable."

Moreover, matters concerning the administration of a trust, which include the question of its irrevocability, are governed by the law of the state where the trust corpus is held and administered.[10] In this case that state is New York, the situs of the trustee, the place where the securities were deposited with the trustee and the place where the trustee administers the trust. Section 23 of the New York Personal Property Law provides that with the written consent of all persons beneficially interested in a trust in personal property the creator of such a trust may revoke it. This statute governs even where the trust instrument specifies that the trust is irrevocable. *Pulsifer* v. *Monges,* 66 N.Y.S. 2d 367, 368 (Sup. Ct., 1946). Here, of course, the creator, the Missouri Pacific, is the only person beneficially interested, and therefore, it may unilaterally revoke the trust.

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[9] "Where Settlor is Sole Beneficiary—If the settlor is the sole beneficiary of a trust and is not under an incapacity, he can compel the termination of the trust, although the purposes of the trust have not been accomplished."

[10] Warner v. Florida Bank & Trust Co., 160 F.2d 766, 772 (5th Cir. 1947); Noble v. Rogan, 49 F. Supp. 370, 371 (S.D. Cal. 1943); Restatement, Conflict of Laws, § 297 (1934).

IV

The court below did not decide the question of elementary trust law just discussed, even though it was invited by the Commission to do so. The Commission recognized that the ultimate question whether a voting trust is effective to insulate a carrier from control of another is a question of law for courts to decide, and not a question within its special competence. The Commission said that a carrier that creates a trust without its prior approval proceeds on the chance "that, if put to the test of judicial scrutiny, the trust will be upheld" as having achieved the desired objective. (App. 2, p. 87a). The voting trust in this case was not subjected by the District Court to the kind of judicial scrutiny that the Commission envisaged.

In leaving unanswered the question of the legal revocability of the trust, the court supplied the Commission with a rationale for its decision, grounded in supposed "realities of the railroad business," that the Commission, which invited a judicial determination of the effectiveness of the trust, did not provide for itself. Under familiar principles this was beyond the court's power. *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168-69; *SEC* v. *Chenery Corp.,* 318 U.S. 80.

The court proceeded on its erroneous way from a misreading of the Commission's report. It stated that the passage of the report in which the Commission declared that "the trust . . . is irrevocable" "was a passage of description, not judgment" and said that the report "contains no indication that *legal* irrevocability of the 'independent voting trust' was critical to the conclusion that the trust was effective for pur-

poses of § 5(4)." (App. 1, pp. 9a, n. 5, 12a). These statements are not accurate descriptions of the Commission's report. (See pp. 10-11, 24, *supra*).

With its erroneous view of the nature of the Commission's decision, the court set forth the authorities sustaining the rule that a settlor who is a sole beneficiary may revoke a trust at will, and it recited the contrary argument made below. This is that the undoubted rule as to a settlor-sole beneficiary trust is not applicable to a commercial trust designed to achieve a particular business purpose, especially where other persons have an interest in having the purpose fulfilled.[11] The court did not rule either that there is

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[11] Only one case has been seriously cited for this supposed exception to the rule of revocability of a trust whose settlor and beneficiary are the same person. That is Hearst v. American Newspapers, Inc., 51 F. Supp. 171 (D. Del. 1943). In that case, arising under Delaware law, a voting trust had been created, stated to be irrevocable for a specified period. In reliance upon the trust loans were made and the loan agreements recited and confirmed the terms of the trust, including its irrevocability. The court allowed the trustee to assert the interest of the lenders arising from their agreements and on that basis to decline to return the securities to the settlor-beneficiary of the trust. The case is wholly inapposite. A Delaware case in which the facts are comparable to those here and which revocation at the instance of a settlor-beneficiary was permitted is H. M. Byllesby & Co. v. Doriot, 25 Del. Ch. 46, 12 A.2d 603 (Del. 1960).

The interested person in this case, analogized to the lenders in the *Hearst* case, is said to be the Interstate Commerce Commission, which has an interest in enforcing § 5(4) of the Act. The Commission has never asserted that this interest gives it the power to defeat an attempted revocation of this or any other voting trust. The draftsmen of the trust could readily have made the ICC a party to it, whose consent to revocation would have been necessary. They did not, although the form of voting trust approved by the Civil Aeronautics Board, in which its approval of termination is explicitly required, was available to them. See Hughes-TWA-Atlas-Northeast, Common Control, 27 C.A.B. 155, 158 (1958).

such an exception or that, if there is, this case is within it. (App. 1, pp. 10a-11a).

The court then said that the Missouri Pacific, having represented to the Commission that its voting trust was irrevocable, might be estopped to assert its revocability. But it did not decide the point. It went on to say that "this debate on revocability of trusts has little to do with this case" and that the question whether the trust insulated Missouri Pacific from control of the C. & E.I. is "addressed more to the realities of the railroad business than the niceties of trust law." The court then quoted from conclusory passages of the Commission's report that rested upon its prior determinations concerning the trust, including its irrevocability, and purported to find in them a judgment of effectiveness of the trust based upon "the realities of the railroad business." (App. 1, pp. 10a-11a). We submit that the Commission was making no such judgment, and we invite the Court's reading of the relevant pages of its report. (App. 2, pp. 85a-87a).

Finally, for good measure the court added reasons of its own for finding the trust an effective insulation device regardless of its revocability. These, as the court's dissenting member said, boiled down to assertions that "the power of the Commission to redress illegal control situations 'is practically plenary' " and that "Missouri Pacific is not likely to eliminate or revoke the trust." The dissenter aptly pointed out that the inapplicability of those two contentions "is apparent" for "the issue is not whether Missouri Pacific would take advantage of a position it gained by reason of its § 5(4) violation or what the Commission could do in the face of Missouri Pacific's exercise of control." (App. 1, p. 30a).

Appellant and the other parties to the proceeding before the Commission and the court below are entitled to the judgment of a court, invited by the Commission, as to the correctness of a necessary premise of the Commission's decision that the Missouri Pacific's violation of Section 5(4) ceased when it placed its C. & E.I. securities in the hands of a trustee. The premise is that the trust was irrevocable; only if that is so did the Missouri Pacific give up dominion over securities that carried with them the power to control the C. & E.I. This Court alone can see to it that the judicial judgment is given.

V

A. The Missouri Pacific continued to acquire securities of the C. & E.I. after its creation of the voting trust in April 1962 and while the Commission's investigation into whether it had unlawfully acquired control of the C. & E.I. continued. Pursuant to arrangements with long-time investment banking associates the Missouri Pacific on February 20, 1964, acquired $4,878,000 of convertible C. & E.I. bonds. It placed them in the voting trust. The associates themselves held 59,900 shares of C. & E.I.'s common stock, which the Missouri Pacific did not purchase outright.

It is a mathematical fact that, if the bonds were converted and if the associated bankers' holdings of common stock are attributed to the Missouri Pacific, the Missouri Pacific would have more than 50 per cent of the C. & E.I.'s stock.

These facts, which were undisputed, were brought to the attention of the Commission by petitions filed by the Illinois Central and the Commission's Bureau

of Inquiry and Compliance, in which the Commission was asked to reopen the record so that it could receive and have for its consideration evidence of this acquisition by the Missouri Pacific of further control of the C. & E.I.

The Commission denied the petitions. After having found that the voting trust created by the Missouri Pacific was irrevocable and thereby insulated the Missouri Pacific from control of the C. & E.I., it said merely that these findings "render moot the issues raised in the petitions filed by Illinois Central and the Bureau . . ." (App. 2, p. 89a).

If, as we have urged above, the Commission's determination that the trust was irrevocable is wrong as a matter of law, then of course upon a return of the case to the Commission it is bound to consider the additional acquisition of C. & E.I. securities by the Missouri Pacific on a correct understanding of the law. But even if it is assumed that the trust was irrevocable its existence did not immunize the Missouri Pacific from the further control represented by the convertible bonds. If converted, the bonds alone represent 32 per cent of the C. & E.I.'s common stock.

This was made clear by the District Court, which, unlike the Commission, read closely and analyzed the undenied allegations of the petitions to reopen and documents appended to them. Its analysis revealed that the bonds were purchased (a) pursuant to an agreement whereby the Missouri Pacific was obligated to one of its associates to take bonds purchased by the associate for the Missouri Pacific unless in its opinion it was legally unauthorized to do so and (b) pursuant to an agreement with the other associate whereby the

bonds would be held by the associate until the Missouri Pacific had final and effective authority from the ICC to control the C. & E.I.

The District Court found that the Missouri Pacific's own legal opinion as to its authority to purchase the bonds was no sufficient insulation and that it had acted in disregard of the condition purporting to prevent its purchase of the bonds until its control of the C. & E.I. had been approved; "it appears that the agreement's shield between [the Missouri Pacific] and the bonds was a mere gossamer with no binding effect . . . ." (App. 1, pp. 20a-21a). Therefore, the court held, for the period in which the options were effective, the period before it had purchased the bonds and turned them over to its trustee, the Missouri Pacific must be charged with the power to control the C. & E.I. that inhered in the bonds. Inexplicably, however, the court did not hold that the Commission, whose sole reason for denying the petitions to reopen as moot was the existence and effectiveness of the voting trust, had erred in denying those petitions and refusing to consider the massive acquisition of further control by the Missouri Pacific. It ascribed to the Commission reasons for denying the petitions that the Commission did not state. It assumed that, since all the facts were before the Commission, including "the conditions under which [the Missouri Pacific] had access to the power to acquire 32 per cent of the C. & E.I.'s stock," it had considered them and that it had not "clearly abused its discretion in finding no sufficient new § 5(4) violation raised by the facts stated in the petitions." (App. 1, p. 21a).

It may be that the Commission has some discretion in the premises, but, contrary to the District Court's

holding, there is no indication in the Commission's report that any such discretion was exercised. Once the court had laid bare the legal error of the Commission in believing that the existence of the trust was a complete answer to the petitions to reopen, the court was bound to set aside the Commission's action and not speculate as to reasons the Commission might have given but did not give for denying the petitions. *Cf. Sunray Mid-Continent Oil Co.* v. *FPC,* 353 U.S. 944. Apprised of its legal error, the Commission, we believe, would have no choice but to reopen the record and receive and consider evidence of the Missouri Pacific's continuing blatant violation of Section 5(4). The Commission's belief that the Missouri Pacific's conduct was comparatively innocent was critical to its decision that the Missouri Pacific was entitled to the benefit of the chain of events it set in train in 1961 with its illegal purchase of C. & E.I. securities. That the Missouri Pacific was capable of the further dubious, if not illegal, acts found by the District Court must affect the Commission's judgment.

B. On the basis of data covering a period no later than 1961 the Commission believed that the C. & E.I. was in desperate straits and therefore its absorption by another, stronger railroad was in the public interest. (App. 2, p. 91a).

In fact, the picture of the C. & E.I.'s situation that emerges from a record made in 1962 is a false picture. Both operationally and financially the C. & E.I.'s situation has improved dramatically since that time. By 1965 the C. & E.I.'s traffic volume had increased by 19 per cent over 1961 and its freight revenues by 24 per cent. It showed a loss in 1960 and barely more than a break-even in 1961; it had net income of

$1,736,000 in 1965. Physically, great improvements were made in the C. & E.I. facilities. The carrier's common stock increased in value by 200 per cent, and in 1965 it issued new common stock, the first issue of equity securities by any railroad since the depression.

The Commission, in denying reiterated requests to reopen the record so that it could have the benefit of these current data, blinded itself to the facts concerning the great improvement in the C. & E.I.'s condition and thereby chose to decide the case on the basis of unrealities.

On this point the court below held that the denial of a petition to reopen is within the Commission's discretion and, in substance, that this discretion cannot be abused. (App. 1, p. 24a).

No decision of this Court goes so far. There is no doubt that the Court has been properly skeptical of parties' complaints that the records in protracted administrative proceedings are stale and should be brought up to date. See *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 534-35; *ICC* v. *Jersey City*, 322 U.S. 503, 514-16; *United States* v. *Northern Pac. Ry.*, 288 U.S. 490. But none of its decisions subsequent to *Atchison, T. & S.F. Ry.* v. *United States*, 284 U.S. 248, impairs the holding of that case that, where the facts underlying an agency's order have changed completely, the agency issuing the order must take steps, by reopening if need be, to apprise itself of the current situation. In that case the drastic change was in the revenue and expense situation of a group of carriers between the time of the making of a record on which maximum rates were prescribed and the time the rate order became effective; the order

was no longer responsive to realities. No more is the order here responsive to realities insofar as it permits a small carrier to be absorbed by a larger one because the small carrier is weak and ill—when in fact the small carrier has become healthy and begun to thrive.

The court that probably reviews more federal administrative actions than any other, the Court of Appeals for the District of Columbia Circuit, has held an agency bound to reopen a record when it was presented in a petition for rehearing with facts showing that a basic premise of a decision, like the debility of the C. & E.I. in this case, was no longer in accord with the facts. *Great Lakes Airlines* v. *CAB,* 294 F.2d 217, 227 (D.C. Cir. 1961), *cert. denied,* 366 U.S. 965; *Braniff Airways Inc.* v. *CAB,* 147 F.2d 152, 153 (D.C. Cir. 1945). That court, acutely sensitive to the practicalities and needs of the administrative process and fully aware of this Court's decisions qualifying the *Santa Fe* case, nevertheless has held in the cases cited that there are circumstances in which the showing of a change in facts critical to the agency's decision is so compelling that the agency, even at the risk of further delay, must enlighten itself. The decision below conflicts with those decisions of the Court of Appeals as well as with the *Santa Fe* case.

CONCLUSION

Probable jurisdiction should be noted and the case set for plenary consideration on the merits.

Respectfully submitted,

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October 1966

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 65 C 1393

ILLINOIS CENTRAL RAILROAD COMPANY, MONON RAILROAD and ST. LOUIS SOUTHWESTERN RY.,
Plaintiff and Intervening Plaintiffs,

- VS -

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, MISSOURI PACIFIC RAILROAD COMPANY, CHICAGO & EASTERN ILLINOIS RAILROAD, LOUISVILLE AND NASHVILLE RAILROAD COMPANY and LEON LEIGHTON,
Defendants and Intervening Defendants.

Decree

This cause having come on for trial before the Court, consisting of three judges convened pursuant to law, and the Court having reviewed the evidence and having considered the briefs and arguments of counsel for the parties, and having rendered and filed its opinion herein, and being fully advised in the premises,

IT IS ORDERED, ADJUDGED and DECREED that the order of the Interstate Commerce Commission entered in Finance Docket Nos. 21755, 21892, and 21980 on February 16, 1964, be, and it is hereby, affirmed.

ENTER:

ELMER J. SCHNACKENBERG
Circuit Judge

BERNARD M. DECKER
District Judge

DATED: August 4, 1966.

APPENDIX B

Section 1(3)(b) of the Interstate Commerce Act, 49 U.S.C. § 1(3)(b), provides:

(b) For the purposes of sections 5, 12 (1), 20, 304 (a) (7), 310, 320, 904 (b), 910, and 913 of this title, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies or through or by any other direct or indirect means; and to include the power to exercise control.

Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), provides:

(2) Unifications, mergers, and acquisitions of control.

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more

carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305 (e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the trans-

action proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected.

In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or cariers by railroad and the duly authorized representative or representatives of its or their employees.

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No. 688

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal From the United States District Court for the Northern District of Illinois, Eastern Division.

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal From the United States District Court for the Northern District of Illinois, Eastern Division.

JURISDICTIONAL STATEMENT

Appellant, St. Louis Southwestern Railway Company (Cotton Belt), appeals from the final judgment and decree of the United States District Court for the Northern District of Illinois, Eastern Division, which sustained a report and related orders of the Interstate Commerce Commission (Commission), and submits this Statement to show that the Supreme Court has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinions of the district court, majority and dissenting, (Appendix 1)[1] are not reported. The report of the Commission (Appendix 2) is printed at 327 I.C.C. 279.

JURISDICTION

This action was brought before a three-judge district court under 28 U.S.C. §§1336, 1398, 2284, 2321-2325, and 5 U.S.C. §1009 to set aside orders of the Commission in *Missouri Pacific Railroad Company—Control—Chicago & Eastern Illinois Railroad Company*, Finance Docket No. 21755. The final judgment of the three-judge court (Appendix A hereto) was entered on August 4, 1966. Appellant filed its Notice of Appeal in that court on September 27, 1966.

The jurisdiction of the Supreme Court to review the judgment of the district court by direct appeal is conferred by 28 U.S.C. §§1253 and 1201(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case, *I.C.C.* v *New York, N. H. & H. R. Co.*, 372 U.S. 744 (1963); *Gilbertville Trucking Co.* v *United States*, 371 U.S. 115 (1962).

STATUTES INVOLVED

Sections 5(2) and 5(4) of the Interstate Commerce Act (49 U.S.C. §§5(2), 5(4)), Sections 8(b) and 10(e) of the Administrative Procedure Act (5 U.S.C. §§ 1007(b) and 1009(e)), and Section 23 of the New York Personal Property Law are set forth in Appendix B hereto.

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[1] Appendices 1 and 2 are printed in a separately bound volume, captioned *Illinois Central Railroad Company* v. *United States of America, St. Louis Southwestern Railway Company* v. *United States of America* and *Monon Railroad* v. *United States of America.*

Particularly involved is the construction of the following portions of Sections 5(2) and 5(4) of the Interstate Commerce Act:

Sec. 5 . . .

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) . . . for any carrier, or two or more carriers jointly, . . . to acquire control of another through ownership of its stock or otherwise . . .;

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon . . . a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable:

* * *

(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue

> to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words "control" or "management" shall be construed to include the power to exercise control or management.

Also involved is the application of the following section of the New York Personal Property Law:

> Sec. 23. Upon the written consent of all the persons beneficially interested in a trust in personal property or any part thereto heretofore or hereafter created, the creator of such trust may revoke the same as to the whole or such part thereof, and thereupon the estate of the trustee shall cease in the whole or such part thereof.

QUESTIONS PRESENTED

The questions presented by this appeal arise from a judgment of the district court sustaining a report and orders of the Commission in a proceeding entitled *Missouri Pacific Railroad Company—Control—Chicago & Eastern Illinois Railroad Company,* Finance Docket No. 21755. The Commission's orders granted the application of the Missouri Pacific Railroad Company (MoPac) under Section 5(2) of the Interstate Commerce Act for authority to control the Chicago & Eastern Illinois Railroad Company (C&EI), discontinued the Commission's investigation of the MoPac's violation of Section 5(4) in purchasing C&EI securities without obtaining prior Commission approval, and denied petitions to reopen the record to receive evidence of changes in circumstances which occurred after the close of the hearing.

The following questions are presented:

1. Did the district court err in sustaining, as based upon a correct interpretation of law and as supported by rea-

soned findings and substantial evidence, the Commission's conclusions: (a) that the MoPac's initial violation of Section 5 (4) of the Interstate Commerce Act was not "flagrant", and (b) that the MoPac's violation of Section 5(4) was terminated when it transferred its C&EI securities to an "irrevocable trust" in which it was the sole beneficiary?

2. Did the district court err in sustaining the Commission's interpretation of the Interstate Commerce Act that, upon a finding that the control for which approval is sought has already been acquired without Commission approval in violation of Section 5(4), the Commission is without power to "summarily" deny an application under Section 5(2) of the Act?

3. Did the district court err in holding that the Commission did not abuse its discretion in refusing to reopen the record to receive evidence that additional securities of the C&EI were acquired by the MoPac without Commission approval after the Commission hearing was completed?

4. In view of the Commission's conclusion that the necessity to place control of the C&EI in the hands of a strong railroad so as to cure its "financially weak and physically deficient" condition as of 1961 was an immediate public interest consideration which outweighed the public interest considerations involved in MoPac's illegal acts, did the court err in sustaining the Commission's denial of petitions to reopen the record to receive evidence that the financial and physical condition of the C&EI had so radically improved in the years 1962 through 1965 as to change the facts upon which the Commission based its weighting of the competing considerations?

STATEMENT

From July, 1959 to December, 1960, the Chairman and the President of the MoPac negotiated with the President of the C&EI for a merger of those railroads or for control of the C&EI by the MoPac. The C&EI rejected the MoPac's last offer in December, 1960, but the MoPac continued to contemplate C&EI merger or control. In 1960 and into August of 1961, the Louisville and Nashville Railroad also engaged in merger discussions with the C&EI; and in that period the Chicago and North Western Railway, the New York Central Railroad and the St. Louis-San Francisco Railway each showed an "interest" in the C&EI.

In late July 1961, the Hammack estate, which owned a block of C&EI securities, offered that block to several railroads which were believed to be interested in acquiring the C&EI. The Hammack securities included 31.4 percent of C&EI's outstanding Class A stock. The C&EI's charter made the consent of two-thirds of the Class A stock outstanding and voting necessary for mergers, leases or sales. The highest percentage of Class A stock voted at any recent C&EI stockholders meeting was 89.6 and the average voted was 80.3. The MoPac was aware that the purchaser of this stock would hold a practical veto over a potential merger between the C&EI and any other carrier.

On August 11, 1961, the MoPac purchased the Hammack securities for $1,400,000, an amount about 40 percent over their market value. The fact of the MoPac's purchase was made known to other railroads. Thereafter, the Louisville and Nashville Railroad ceased its consideration of merger with the C&EI, and the C&EI management had no further merger overtures from any other railroad.

On September 19, 1961, the MoPac filed an application with the Commission in Finance Docket No. 21755 for authority under Section 5(2) to control the C&EI.

On April 20, 1962, over eight months after its purchase of the Hammack securities, the MoPac created a trust with the Marine Midland Trust Company of New York as trustee and the MoPac as sole beneficiary, and transferred title to its C&EI holdings to the trustee. The trust was denominated "irrevocable" on its face and by its terms was to remain in effect until (1) the sale of all the securities by MoPac; or (2) the delivery to the trustee of an order of the Commission authorizing MoPac's control of C&EI or authorizing the release of the securities; or (3) the passage of 10 years.

Hearings were conducted before the Commission on a common record in both the application of the MoPac for control and a companion application by the Illinois Central (I.C.) for control of the C&EI (Finance Docket No. 21892), and also in an investigation initiated by the Commission on its own motion to determine whether the MoPac had violated Section 5(4) of the Act by acquiring control of the C&EI without authority from the Commission (Finance Docket No. 21980). This appellant was a party to the Commission's proceedings. The hearings were concluded in June of 1962.

Between November, 1963 and February, 1964, the MoPac executed agreements with Eastman Dillon, Union Securities & Co., and Dempsey-Tegler and Co. which gave it the power to purchase $4,878,000 in C&EI's convertible bonds, giving MoPac access to 32 percent of C&EI's common stock through the bonds. No authority was received by the MoPac from the Commission for these transactions, all of which were carried on after the hearings

were concluded but while the MoPac's application was still being processed by the Commission. On February 20, 1964, after executing its options, the MoPac transferred title of the bonds to its trustee the Marine Midland Trust Company. On August 20, 1964 and August 31, 1964, the I.C. and the Commission's Bureau of Inquiry and Compliance petitioned the Commission to reopen the record to show that the MoPac had acquired these additional securities of the C&EI without Commission authority.

By report and order served on March 8, 1965, the Commission issued its decision granting authority to the MoPac to control the C&EI, denying the I.C.'s similar application for control, and discontinuing its investigation of the MoPac's illegal purchases of the C&EI securities.

The Commission expressly found that the MoPac had violated Section 5(4), since it "clearly possessed, by virtue of its direct holdings of Eastern's class A stock during the 8 months preceding the creation of the trust in April 1962, the power to prevent a two-thirds majority of such stock from being voted at any stockholder meeting . . .; and as a result, it would have been able to block stockholder assent to, and thereby prevent Eastern from accomplishing, various corporate transactions such as mergers, leases and sales." (App. 2, pp. 83a-84a) It further found that the trust into which MoPac transferred its securities "during its term, is irrevocable" (App. 2, p. 86a); that "By its terms, the trust was adequate to divest Missouri Pacific of any power it might possess to control or manage the affairs of Eastern in a common interest with its own through the ownership of the Eastern securities originally deposited with, or later acquired by, the trustee" (App. 2, p. 87a); and therefore, that "from after the time the trust arrangement was put into effect, Missouri Pacific has had neither control nor power to control the affairs of Eastern." (App. 2, p. 87a)

The Commission held that its disposition of the trust issue rendered "moot the issues raised in the petitions filed by Illinois Central and the Bureau wherein further hearing is sought for the purpose of establishing that, by its trustee's acquisition of additional of Eastern's stock and convertible bonds subsequent to the hearing, Missouri Pacific and persons associated with it have acquired the power to control Eastern." (App. 2, p. 89a)

The Commission further concluded that "Even though we find a statutory violation through the unlawful acquisition of control [apparently referring to the eight-month period preceding the creation of the trust], we are not free to summarily deny Missouri Pacific's application." (App. 2, p. 89a) It "observed" that several "restraining measures self-imposed" by MoPac showed that none of the acquired power to control the affairs of Eastern was actually exercised, and gave as one example the MoPac's acquiescence in the decision of the Hammack appointed directors to serve out their terms. The Commission made no findings on the evidence which showed that the Missouri Pacific was aware that other railroads were discussing merger with the C&EI prior to MoPac's purchase of the Hammack securities and that the MoPac was aware that by merely taking title to the Hammack securities it thereby took unto itself the power to veto any merger by the C&EI. Nor did the Commission make any findings on the evidence which showed that after MoPac's purchase of the Hammack securities all merger discussions ceased between the C&EI management and the other railroads.

Finally, the Commission held that "denial of the applications herein, on whatever ground, would leave Eastern independent, as a relatively small, financially weak, and

physically deficient railroad" (App. 2, pp. 90a-91a), that the need of present-day railroading "makes it essential that Eastern have access to revitalizing resources outside of itself", and that the MoPac's application afforded the Commission the "opportunity to approve remedial proposals capable of preventing a recurrence [of bankruptcy], at least in the foreseeable future." (App. 2, p. 91a) Based on this consideration, the Commission approved the MoPac's application for control, notwithstanding the Commission's findings that the MoPac had violated the control provision of the Act.[2]

The I.C. brought an action in the District Court for the Northern District of Illinois to set aside the report and orders of the Commission. The Monon Railroad and the Cotton Belt intervened as parties plaintiff. The MoPac, C&EI and one of its stockholders, and the Louisville and Nashville Railroad intervened as defendants in support of the order. The Commission's order was enjoined pending a final decree by the court. In a two to one decision, the court sustained the report and orders of the Commission. After the final decree of the court, the Commission reinstated but then postponed the effective date of its orders.

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[2] The Commission prescribed, as a condition of MoPac control, that MoPac take steps necessary (1) to cause C&EI to negotiate with the Louisville and Nashville Railroad for purchase of the C&EI's Evansville line, and (2) to provide temporary operation by Louisville and Nashville over the Evansville line. This appellant raises no issue directed to the validity of these rulings.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

In light of the current wave of railroad control, consolidation and merger applications before the Interstate Commerce Commission, it is particularly important that the Commission, the railroad industry and the financial community know the powers and duties of the Commission under Sections 5(2) and 5(4) when one railroad obtains control of another prior to Commission approval and later seeks to avoid the consequences of its illegal act by transferring the ownership of the controlling securities to a voluntary trust in which it is sole beneficiary.

This case presents the further significant question of whether the Commission has unlimited discretion to deny petitions to reopen, even petitions which proffer evidence that the underlying factual predicate of a decision has been destroyed.

Also presented is the question whether the Commission discharges its obligation under Section 8(b) of the Administrative Procedure Act when, as here, it fails to make findings on significant factual matters presented in the record.

I.

The district court held that the Commission did not err when it found that there were mitigating circumstances in the MoPac's illegal acquisition of the Hammack interests.

It is not disputed that at the time MoPac made its illegal purchase it was interested in either merger with C&EI or in gaining control of C&EI and that it was aware that its power to achieve either objective was in jeopardy because competing railroads were engaged in merger discussions with the C&EI. Nor is it disputed that the MoPac knew that it could put an end to this threat by purchasing the Hammack securities. Indeed, the President of the MoPac

told the President of the C&EI that the Missouri Pacific had purchased the Hammack securities "to prevent them from falling into unfriendly hands such as the North Western, L&N, or the Southern." (Com. Tr. 2285)[3] Nor is it disputed that MoPac's course of action has been successful in stopping all merger discussions by competitors.

The Commission made no findings on these undisputed facts of record. Rather, in determining whether or not the MoPac's violation was flagrant, it considered only whether MoPac took any overt acts to interfere in the management of the C&EI. Under the circumstances here presented, whether or not the MoPac attempted to exercise management control is wholly beside the point in evaluating MoPac's illegal acts. The MoPac fully accomplished its purpose when it deliberately obtained the power to veto, by inaction, a merger of the C&EI with the other railroads which were actively considering such a step. The Commission's initial error, therefore, is its failure to make reasoned findings, as required by Section 8(b) of the Administrative Procedure Act, which would show that it considered such material facts. Had it considered and made findings on the above undisputed evidence of record, it could only have concluded that the violation was flagrant.

II.

The district court also sustained the Commission's conclusion that the MoPac's transfer of the illegally acquired securities to an irrevocable trust terminated MoPac's illegal control. In concluding that the MoPac's transfer of these securities to the trust terminated the offense, the Commission limited its consideration to the language of the trust instrument itself which purported to provide that the trust was "irrevocable". From all that appears in the

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[3] Com. Tr. refers to the certified record of the proceedings before the Commission which are part of the record transmitted to the Clerk of this Court.

Commission's report, the Commission gave no consideration to the law which governs whether a trust which has the settlor as its sole beneficiary is irrevocable. In limiting its consideration to the face of the trust instrument, it ignored the pertinent statutory and case law which provide that a settlor-sole beneficiary can revoke such a trust at will.

The district court excused this failure on the ground that the Commission was not concerned with whether the instrument was irrevocable as a matter of law, but was concerned with the practical "success" and "effectiveness" of the trust to divorce MoPac from power of control (p. 17).[4] In reaching this conclusion, the district court

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[4] The district court also indicated that it might have sustained the Commission, had it interpreted the Commission's report as concluding that the trust is irrevocable as a matter of law. The court said:

> It may well be that having asserted irrevocability to the Commission to protect itself, MoPac was estopped from changing its position and asserting elsewhere that the trust was revocable. *Compare Hearst* v. *American Newspapers,* 51 F. Supp. 171 (D.Del. 1943). Under the circumstances of this case, the trust might be considered irrevocable. (App. 1, p. 10a)

Judge Campbell, in his dissenting opinion, concluded that the trust was legally revocable. The majority cites *Hearst* v. *American Newspapers,* 51 F. Supp. 171 (D.Del. 1943), which holds only that a court will enforce a loan agreement, made after a trust agreement, which bars revocation of the trust. In any event, the *Hearst* case involved the interpretation of Delaware law, not the law of New York, which is here applicable. See *Warner* v. *Florida Bank & Trust* Co., 160 F.2d 766, 772 (5th Cir. 1947); *Noble* v. *Rogan,* 49 F. Supp. 370, 371 (S.D. Cal. 1943); and *Restatement of the Law of Conflicts of Laws,* §297. Under New York law, the revocability of trusts is governed by statute, *Guaranty Trust Co. of New York* v. *Howe,* 86 N.Y.S. 2d 808, 813 (1948) and *Pulsifier* v. *Monges,* 66 N.Y.S. 2d 367, 368 (1946), which provides that the settlor and beneficiaries may revoke a trust. *New York Personal Property Law,* §23. Finally, since revocability is a question of law, representations of the MoPac on the legal effect of a trust cannot operate as an estoppel. *Uhlmann Grain Co.* v. *Fidelity & Deposit Co.,* 116 F. 2d 105 (7th Cir. 1941).

said that since the Commission had plenary power over MoPac, it is "beyond reasonable comprehension to suppose that MoPac would revoke this trust prior to gaining Commission approval." (App. 1, p. 13a) The court does not explain why it is "beyond reasonable comprehension to suppose" that MoPac, which had illegally acquired and held control of the C&EI for eight months, would be so overawed by the Commission's power as not to hold or exercise such control for its own benefit at some later date. There is no indication in the Commission's report that this inventive speculation was the Commission's rationale. There are no findings in the report to suggest that the Commission even considered the matters relied upon by the court. Thus, the lower court clearly erred in resting its holding on grounds not advanced by the Commission. The Commission's report must stand or fall on the findings which it made. *Securities and Exchange Com.* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-9 (1962)

The justification for the doctrine of administrative law that a reviewing court cannot supply findings for the administrative body is well illustrated in this case. By attempting to reach beyond the scope of the Commission's report, the district court erred in its understanding of the facts. Viewed in practical terms of success or failure, the trust was a failure. As late as January 14, 1965, the C&EI publicly acknowledged that the MoPac still had a practical veto over a C&EI merger with other railroads. Counsel for the C&EI expressed the facts in the real world when he then stated in oral argument to the Commission: "Our hands are tied. We can't talk to anyone." (Com. Tr. 5938) The practical reasons why there could be no negotiations between C&EI and other roads looking to merger are apparent on a moment's

reflection. So long as there is a reasonable doubt concerning the revocability of the trust, prudent C&EI management would not dare discuss merger with a road other than MoPac and prudent management of an outside railroad would not waste its time and resources on such discussions. Thus, MoPac continued to accomplish its unlawful objectives, after, as well as before, its execution of the "irrevocable" trust.

Whether an "irrevocable" voting trust insulates a carrier from what would otherwise be a violation of Sections 5(2) and 5(4) of the Interstate Commerce Act raises a question of general and substantial importance. In a situation where two competing carriers are vying for the control of a third as a means of enabling them to reach an important terminal or gateway point, it can readily be seen that one carrier, by purchasing sufficient securities to veto control by the other carrier and placing them in a voting trust for a period of ten years, could effectively frustrate any effort by the other to acquire control. Moreover, if the Commission were subsequently to approve an application for control, the settlor-sole beneficiary of the trust would have the advantage of already owning the necessary shares. On the other hand, if the Commission should deny its application for control, it has had the benefit of eliminating new competition for a considerable period of time which, if the Commission and the court are correct as to the lawfulness of settling such trusts without authority from the Commission, can be continued indefinitely. By sanctioning this voting trust device, the Commission and the court have frustrated the important purposes of Section 5 of the Interstate Commerce Act. Such ruling, if allowed to stand, would present an invitation for similar future action by other railroads.

This effect of the district court's decision is not mere speculation. The Commission's decision has already had this effect. The Chesapeake & Ohio Railway has purchased or contracted for well over 50 percent of the stock of the Chicago South Shore & South Bend Railroad without approval of the Commission. It claims insulation from a violation of Section 5(4) because it transferred title in the stock to a trust in which it is the settlor-sole beneficiary. In a report issued after the court's opinion, *Chesapeake & Ohio Railway Co.—Control—Chicago South Shore & South Bend Railroad,* Finance Docket No. 23566, the Commission's Examiner follows the rule of the instant case and gives his blessing to the trust device. The spreading use of the trust device will soon make a farce of the prohibition in Section 5(4) of the Interstate Commerce Act against acquiring control without prior Commission approval.

III.

The Commission interpreted Section 5(2) of the Act as requiring that it give consideration to possible benefits of MoPac's control of the C&EI, saying "even though we find a statutory violation through the unlawful acquistion of control, we are not free to summarily deny Missouri Pacific's application." (App. 2, p. 89a)

The district court accepted this limited view of the Commission's power. Such a reading of the Interstate Commerce Act does not square with the views of this Court as stated in *Gilbertville Trucking Co.* v *United States,* 371 U.S. 115 (1962). In that case, the Commission denied an application under Section 5(2) for merger on the ground that the applicants had engaged in illegal acts of management in a common interest, contrary to Section 5(4). In its appeal, the applicant contended that the Commission's decision was arbitrary in denying approval of control on

that ground. In ruling on that contention, this Court said in a unanimous decision:

> However, even an automatic rule is not necessarily arbitrary. As already noted, § 5(4) is integral to the success of the regulatory scheme. To approve a merger in the face of a §5(4) violation may encourage others whose merger may or may not be consistent with the public interest to either present the Commission with a fait accompli or avoid its jurisdiction altogether. [p. 128].

Had the Commission here understood that it had the power summarily to disapprove the MoPac's application, it might well have held, after a proper evaluation of the degree of flagrancy of the MoPac's violation of Section 5(4), that MoPac's Section 5(2) application should be denied.

The recurring question of the Commission's power to deny applications summarily upon a finding of illegal acquisition of control should be ruled upon by this Court.

IV.

Four separate petitions were filed with the Commission requesting that it reopen the record to receive evidence on matters occurring after the close of the record. Two of the petitions, one filed by the Illinois Central and the other by the Commission's Bureau of Inquiry and Compliance, sought to show that the MoPac had acquired a majority of the voting stock after the close of the hearings and that it had thereby obtained power to control management decisions as well as to veto mergers. The other two petitions, one filed by the Chicago and North Western Railway and the second by the Cotton Belt, sought to reopen the record so that the Commission might receive evidence

on the sharp improvement in the financial and physical condition of the C&EI subsequent to 1961.

The petitions addressed to the MoPac's acquisition of additional securities which gave it majority control were denied by the Commission solely on the ground that the issue was "moot" in light of its determination that the trust into which the Commission said these additional purchases were transferred was "irrevocable". The district court found that these securities were held outside the trust for some time, but upheld the Commission by putting words in the Commission's report which are not there. The court said that:

> . . . the Commission was entitled to consider not only the mathematical power, if any, inherent in this quantity of stock, but also the conditions under which MoPac had access to it. While MoPac tread close to the line of another §5(4) violation, we cannot hold that the Commission clearly abused its discretion in finding no sufficient new §5(4) violation raised by the facts stated in the petitions. Although we may disagree with this ruling, our scope of review is limited to determining whether there is warrant in the law and facts for the result reached (App. 1, p. 21a).

The Commission did not consider "the conditions under which MoPac had access" to the additional stock; nor did it find that there was not a "new Section 5(4) violation". It refused any consideration of the petitions solely on the ground that its disposition of the trust issue mooted the questions raised by the petitions to reopen. Once the district court concluded that the securities were held outside the trust, then on its own theory of the proper basis for a Commission decision it should have remanded the case to the Commission for the Commission to make the kind

of evaluation which the district court said the Commission made, but which it in fact did not make.[5]

V.

The Commission also denied the petitions of the Chicago and North Western Railway and Cotton Belt to reopen, even though those petitions, if granted, would have destroyed the predicate for the Commission's conclusion that public interest considerations dictated that it approve MoPac control of the C&EI. The Commission expressly found in its report that denial of the application would leave the C&EI as a "financially weak and physically deficient railroad" and that control by MoPac would provide an immediate remedy "capable of preventing a recurrence [of bankruptcy], at least in the foreseeable future." (App. 2, p. 91a)

The Commission's expressed fear that disapproval might make it an accomplice in C&EI's bankruptcy was based upon the condition of the C&EI as of 1961. The evidence proffered in the petitions to reopen the record showed that between 1962 and 1965 the C&EI had become rehabilitated both physically and financially. Its traffic volume was up 19 percent over 1961; its freight revenue was up 24 percent; its net income was $1,736,000 in 1965 as contrasted with a net loss in 1960 of $996,000 and a net income in 1961 of only $300,000; its working capital was a comfortable $2,631,000, in contrast to a negative position of $2,437,000

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[5] In his dissenting opinion, Judge Campbell properly stated that the proceeding should be remanded to the Commission "to review and make findings as to the facts surrounding the Dempsey-Tegeler and Eastman-Dillon convertible bond purchases, specifically inquiring into the length of time the bonds were held and to whom they were sold." (App. 1, p. 33a)

in 1961; its divisions with connections, all of which are carried down to net income, increased $425,000 per annum; its common stock increased in value by 200 percent, and it issued new common stock in 1965, the first issue of equity stock by any railroad since the Great Depression. On the physical side, the C&EI accomplished substantially all of the improvements which witnesses suggested were essential to restore its plant facilities. Judge Campbell said in his dissenting opinion that "the significance of this information cannot be questioned and I would have the Commission reopen the record to give it proper consideration." (App. 1, p. 32a)

These dramatic improvements in the condition of the C&EI show a striking parallel to the kind of change in economic circumstances which led this Court to hold in *Atchison, T. & S.F. R. Co.* v. *United States,* 284 U.S. 248 (1932), that the Commission should have reopened that proceeding. In that case, the petition to reopen offered to show that since the close of the record the revenues and car loads of the carriers had declined 15 percent (as compared to a 24 percent increase in C&EI revenues), their operating net income had been severely reduced, their credit standing had been impaired, and the market price of their stock had so declined as to preclude equity financing.

In denying the Cotton Belt's petition, the Commission relied on *Interstate Commerce Commission* v. *Jersey City,* 322 U.S. 503 (1944), which upheld the Commission's refusal to reopen a proceeding to receive new evidence. In that case, this Court said that *Atchison* has been "restricted . . . to its special facts . . . and it stands virtually alone" [p. 515]. The facts offered by the Cotton Belt in the instant case are the same kind of "special facts" offered in *Atchison.* Thus, the instant case cannot be distinguished

from *Atchison*. If the Commission has not abused its discretion in the instant case, *Atchison* is no longer the law. Before this Court decides whether it should overrule *Atchison*, it should have the benefit of plenary consideration, so that it may understand the consequences of giving an administrative agency unlimited power to ignore subsequent events which, if considered, would render its findings invalid as unsupported by existing facts.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted, and the case should be set for full hearing on the merits.

Respectfully submitted,

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October 1966

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APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 65 C 1393

ILLINOIS CENTRAL RAILROAD COMPANY, MONON RAILROAD and ST. LOUIS SOUTHWESTERN RY.,
Plaintiff and Intervening Plaintiffs,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, MISSOURI PACIFIC RAILROAD COMPANY, CHICAGO & EASTERN ILLINOIS RAILROAD, LOUISVILLE AND NASHVILLE RAILROAD COMPANY and LEON LEIGHTON,
Defendants and Intervening Defendants.

DECREE

This cause having come on for trial before the Court, consisting of three judges convened pursuant to law, and the Court having reviewed the evidence and having considered the briefs and arguments of counsel for the parties, and having rendered and filed its opinion herein, and being fully advised in the premises,

IT IS ORDERED, ADJUDGED and DECREED that the order of the Interstate Commerce Commission entered in Finance Docket Nos. 21755, 21892 and 21980 on February 16, 1964, be, and it is hereby, affirmed.

Enter:

Elmer J. Schnackenberg
Circuit Judge
Bernard M. Decker
District Judge

Dated: August 4, 1966.

APPENDIX B

A. Section 5 of the Interstate Commerce Act, 49 U.S.C. § 5, provides:

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise: or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the

public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this para-

graph and paragraph (5), the words "control or management" shall be construed to include the power to exercise control or management.

B. Sections 8(b) and 10(e) of the Administrative Procedure Act, 5 U.S.C. 1007(c) and 1009(e), provide:

8(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

10(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right,

power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

C. Section 23 of the New York Personal Property Law provides:

Upon the written consent of all the persons beneficially interested in a trust in personal property or any part thereof heretofore or hereafter created, the creator of such trust may revoke the same as to the whole or such part thereof, and thereupon the estate of the trustee shall cease in the whole or such part thereof.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. .....

MONON RAILROAD,

Appellant,

vs.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION.

JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANT, MONON RAILROAD.

OPINIONS BELOW.

The majority opinion and the dissenting opinion of the District Court denying appellant an injunction and affirming the order of the Interstate Commerce Commission (Commission) are not yet reported.*

* Because of the volume involved, the District Court opinions and the Commission's report are set forth in a separately bound volume filed by Illinois Central Railroad Company on behalf of all appellants (hereinafter referred to as "App.").

JURISDICTION.

This is an appeal taken, pursuant to 28 U. S. C. § 1253, from the judgment of a three-judge District Court, dated August 4, 1966, which court, by a two to one majority, affirmed the order of the Commission herein, and denied Monon Railroad's (Monon) prayer for an injunction restraining the enforcement of said order.

STATUTES INVOLVED.

Section 5(2) of the Interstate Commerce Act, 49 U. S. C. § 5(2), provides in part as follows:

> "(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—
>
> "(i) * * * for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; * * *.
>
> "(b) * * * If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable; * * *"

The Administrative Procedure Act provides in part (5 U. S. C. § 1007(b)):

> "* * * All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the ma-

terial issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof. * * *"

QUESTIONS PRESENTED.

The majority opinion of the District Court in affirming the Commission's order stated (App. p. 26a):

> "The Commission appears to have decided, *as it was required to do,* the question of the ultimate desirability of the L&N control of the Evansville Line." (Italics ours.)

The court, although thus recognizing that the Commission had decided the "ultimate desirability" of the L&N control of the Evansville line, nevertheless held that the Monon is not entitled to consideration by the Commission of its evidence and objections, nor to findings and conclusions of the Commission thereon, in the current proceeding because there will be a later proceeding under Section 5(2) of the Act to approve the details of said acquisition, at which time it is asserted that the Monon can again raise its objections (App. pp. 26a, 27a) and apparently again present its evidence.

The questions presented are:

1. Did the District Court err in holding that the Commission need not make findings with respect to the injury to the Monon which would result from a condition imposed by the Commission in its order?

2. May the Commission in a proceeding under Section 5(2) of the Interstate Commerce Act (the Act), 49 U. S. C. § 5(2), determine that public interest requires the acquisition of a line of railroad by the Louisville and Nashville Railroad Company (L&N) despite the failure of the Commission to make any findings as to the objections, evidence and contentions of damage to Monon as a competing railroad?

3. May the Commission find that such a transaction is consistent with the public interest as set forth in Section 5(2) of the Act when the Monon, as a competing railroad, will be damaged thereby so as to impair or endanger its continued operation and existence?

4. Has not the Commission, in finding said acquisition "would be consistent with the public interest" (App. p. 57a) as required under 5(2) (b) of the Act, made a final determination of that issue without making requisite findings of fact and will not the Monon thereby be foreclosed from again raising this issue (which issue is vital to Monon) in any later proceeding under Section 5(2) of the Act?

5. Has the Commission, in ignoring the Monon's evidence, complied with its duty to accommodate a proceeding under Section 5(2) of the Act with the antitrust laws of this nation as required by the decisions of this Court?

STATEMENT OF THE CASE.

The Commission's decision and order authorized the Missouri Pacific Railroad Company (MoPac) to obtain control of the Chicago and Eastern Illinois Railroad Company (C&EI; also referred to as Eastern by the Commission) on condition that after obtaining such control MoPac would cause the C&EI to sell its Evansville line to the L&N. Monon's evidence showed that if L&N were permitted to acquire the Evansville line Monon would lose $1,800,000 per year in gross annual revenues (App. p. 166a) out of a total of $18,000,000 gross annual revenues. Although this evidence was challenged by the L&N, the L&N admitted the Monon would lose $566,793 per year in gross revenues (Transcript (Tr.) 5526, 5527, 5541, 5556 and 5558) and on cross-examination admitted that in addition some traffic of the Southern Railroad Company (Southern) now moving from the south of the United States to

Chicago via Southern-Monon would be diverted to L&N (Tr. 5541). No finding was made by the Commission on any of this evidence.

For the years involved (1959 to 1961), the C&EI had almost twice the gross revenue of the Monon ($104,785,000 (App. p. 105a), as compared with $56,766,812 of Monon revenue (Exhibit H-160)). For the same years, the C&EI sustained a net income loss of $336,000 (App. p. 105a) while the Monon sustained a loss almost seven times as great, viz., $2,147,749 (Exhibit H-160).

Monon's evidence showed that with the necessary reduction of through trains and other service reductions it could not continue to attract overhead freight from other railroads. Such reduced service would increase detention time on freight cars causing a shortage of cars in critical periods. Maintenance, new equipment purchases and rehabilitation would have to be deferred. Adding this loss of revenue, after such economies, to the existing operating deficit would deplete cash to the point that the payroll could not be met eighteen months thereafter (Examiner's Report pp. 95, 96). This evidence was uncontroverted. No finding was made by the Commission upon it.

The majority decision of the District Court held (App. pp. 26a, 27a) that while the Commission was required to decide and has decided "the ultimate desirability of L&N control of the Evansville Line," the question of competitive effect upon the Monon need not be decided herein because the order only requires compulsory negotiations and, therefore, Monon "Will have ample judicial protection" in the later 5(2) proceedings approving such negotiations, at which time Monon can raise its objection. As noted below, no such protection exists. The court in holding that it would not pass upon the sufficiency of the findings, as to the injury to the Monon, observed that the general findings to the effect that L&N's competitors (without naming the

Monon) would not be significantly injured were probably enough citing *McLean Trucking Co.* v. *U. S.* (1944), 321 U. S. 67, 87, 88. *McLean,* however, is totally inapplicable. In the present case, there were no specific findings as to the Monon whereas in *McLean* extensive specific findings were made (321 U. S. 67 at pages 88 to 90).

Chief District Judge Campbell, in dissenting, stated (App. p. 33):

> "Also, *the Monon's evidence, heretofore ignored by the Commission,* should be heard and a finding should be made as to what effect, if any, the Commission's present ruling will have on the Monon—L&N dispute. The intended scope and extent of the Commission's directive, if renewed, that the Missouri Pacific negotiate the sale of what has been referred to as the Evansville line to the L&N should be made more exacting and definitive. Necessarily, the effect of this directive on the Monon or on a subsequent § 5(2) application should be spelled out. * * *". (Italics ours.)

THE QUESTIONS ARE SUBSTANTIAL.

I.

The Commission found that control of the C&EI by MoPac would be authorized if, and only if, the L&N operates through trains over the C&EI's Evansville-to-Chicago line (App. 67a, 68a, 92a). That condition is thus an essential predicate for Commission approval.

The Monon presented evidence to show that such an operation by the L&N to Chicago would seriously impair the ability of the Monon to compete. The Commission, in violation of the Administrative Procedure Act, 5 U. S. C. 1007 (b), failed to make any findings as to Monon's evidence or objections. As dissenting Chief Judge Campbell observed, Monon's evidence was ignored (App. p. 33a). Specific findings are a basic prerequisite to the validity of

a Commission order and mere general conclusions are insufficient. *Burlington Truck Lines* v. *U. S.* (1962), 371 U. S. 156, 167, et seq.

A merger or acquisition of one railroad by another railroad is against the public interest if a competing railroad is thereby seriously injured. In *Chicago, Burlington and Quincy Railroad Company Control,* 271 I. C. C. 63, 157, the Commission stated:

> "We have approved transactions found to be desirable and necessary in the public interest notwithstanding the prospective loss of some revenue by competing carriers. *We have not done so, however, where the proposed transaction would endanger or impair the operations of other carriers contrary to the public interest.*" (Italics ours.)

Thus, the Commission's own criteria require a specific finding on the Monon's evidence in this case. Apparently, "public interest" in this regard has never been passed upon by this Court.

II.

The majority opinion seems to establish a new principle, viz., that an agency can determine an issue without findings and avoid judicial review thereof so long as there may be later proceedings as to some subsidiary or supplemental question. Such a principle would defeat judicial review. It would permit issues of substance to be determined without findings, provided trivial issues are left open for later determination. It would violate the repeated adjurations of this Court that there must be an end to litigation and that piecemeal litigation is to be abhorred. Monon has for over five years engaged in this litigation only to be told that it now must start all over in a later proceeding despite the acknowledgment of the District Court that the "ultimate desirability" of the L&N acquisition *has already been determined* by the Commission herein (App. p. 26a).

The later proceeding that the District Court envisions as a protection to the Monon is limited to the negotiation of the purchase of the Evansville Line by the L&N from the C&EI. The Commission stated (App. p. 57a), that it was setting up a "mechanism" to effect the purchase by requiring compulsory negotiations with a later proceeding to approve the sale or lease so negotiated. The Commission acknowledged (App. p. 56a) that the second proceeding will evaluate the details of the transaction, including the price to be paid. These are essentially private negotiations between two railroads over details not involving the Monon. Under 49 U. S. C. § 5(2)(b), the Commission is authorized to dispense with hearings. That there may not be a later hearing is confirmed by the Commission's brief filed in the District Court wherein in alluding to the later Section 5(2) proceeding it was stated: "(with *the possibility* of further hearing)." (Italics ours.)

It is to be noted that neither the Commission nor the District Court suggests that there should be negotiations *with the Monon,* and yet the most vital interests and even the continued existence of the Monon may, according to the District Court, be determined by the outcome of such negotiations.

III.

The Illinois Central Railroad and the Chicago and North Western Railway also claimed competitive injury to them. A whole section of the Commission Report involving over five pages and entitled "*Diversion of Traffic*" (App. pp. 49a to 54a), is devoted to a detailed explanation of why those railroads will not be injured. The Monon was not mentioned in the Commission's review of this issue, yet the Commission devoted pages (App. pp. 55a, 56a) to answering a minor contention of the Monon on another point. The specific findings afforded to these two rail-

roads on the question of competitive injury by diversion of traffic are the findings to which the Monon is entitled under the statute and previous decisions of this court. *Burlington Truck Lines* v. *U. S.*, 371 U. S. 156, 167.

IV.

The Commission decision and order established the immediate right in the L&N (App. p. 68a) to provide service over the Evansville Line on a temporary basis pending final acquisition. Such interim use of this line will result in grievous injury to the Monon by diversion of its traffic, and such an injury should be subject to judicial review. Yet the judgment of the District Court, in disregard of the lack of requisite findings by the Commission, affirms this part of the Commission's order, effectively denying such review. Further, after the MoPac has acquired control of additional stock, after the L&N has been using the Evansville Line, and has thereby effectively eaten away the Monon's traffic, and after the acquisition has been completely negotiated it is almost facetious to contend that the Commission will be able to unravel everything that has gone before so that Monon will receive the impartial hearing to which it is entitled.

V.

The District Court has reached a conclusion as to the Monon which is neither mentioned, considered or explained by the Commission. Such appellate procedure was rejected in *Securities and Exchange Commission* v. *Chenery*, 332 U. S. 194, 196, where this court held that a Commission determination must be reviewed by the court on the grounds invoked by the agency, and if the grounds are inadequate or improper, it cannot supply a proper basis without the reviewing court projecting itself into a domain restricted by Congress to the agency. Further, the basis of the agency

determination must be set forth with clarity. In *Burlington Truck Lines* v. *U. S.*, 371 U. S. 156, 168, 169, it is stated:

> "* * * The courts may not accept appellate counsel's post hoc rationalizations for agency action; Chenery requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself: * * *."

The District Court opinion is inconsistent and in error because it failed to heed this court's above quoted admonition. The District Court, in holding that the Commission determined the "ultimate desirability" of the L&N's acquisition of the Evansville Line (App. p. 26a), could only mean that the acquisition is in the public interest. This is a final determination and is so treated by the District Court. Yet, the court stated that the only issue decided is whether "compulsory negotiations" are warranted and added that mere negotiations between the two railroads will have no competitive effect upon the Monon. It is not the negotiations to which the Monon objects—it is the right and authority to enter into those negotiations, which right and authority the Commission, without affording Monon a hearing, has determined are in the public interest. Monon's injury if this acquisition is permitted will be precisely the same regardless of the price paid and the other details to be later negotiated and approved.* The court's statement that the Monon can raise its objections in the later 5(2) proceeding (App. p. 27a) is in direct conflict with the Court's statement that the public interest issue has already been determined. Further, how can the District Court grant Monon "ample judicial protection" as to an issue already disposed of herein?

Significantly, the Commission at no time indicated that Monon could ever again raise the public interest issue, or

---

* A permissive Commission order is as reviewable as a mandatory order, *B. & O. R. Co.* v. *U. S.*, 264 U. S. 258, 263, 264.

that Monon would be given a further opportunity to raise the issue in the later Section 5(2) proceeding or that Monon would be protected in the later Section 5(2) proceeding as stated by the District Court. The Commission's failure to make findings is excused by the Court on the ground that evaluation of the competitive effect of the L&N operation over the Evansville line could come in a subsequent proceeding. However, there was no evidence before, and there were no findings by, the Commission that such evaluation could be made later and the Monon thus protected. On the contrary, the Commission's statements as to the scope of the subsequent purchase proceedings do not permit the later consideration of this issue.

VI.

As the record now stands, Monon will be denied a hearing in these proceedings and yet will be bound later under the theory of *res judicata* because a final determination has been made as to the public interest issue. An agency's determination, upon judicial review, is subject to the rules of *res judicata* the same as if private litigants were before the court. *International Union* v. *Eagle-Picher M. & S. Co.*, 325 U. S. 335, 340; *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 476, 477; *Sunshine Anthracite Coal Company* v. *Adkins*, 310 U. S. 381, 401 et seq.

VII.

A serious question exists as to the violation of the antitrust laws, which question the Commission has failed to consider. In *Seaboard Airline R. Co.* v. *U. S.* (1965), 382 U. S. 154, 156, this court stated:

> "We believe that the District Court erred in its interpretation of the directions this Court set forth in *McLean Trucking Co.* v. *United States*, 321 U. S. 67 (1945), and *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U. S. 173 (1959). As we said in *Minneapolis*, at 186:

> "'Although § 5(11) does not authorize the Commission to "ignore" the antitrust laws, *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 80, there can be "little doubt that the Commission is not to measure proposals for [acquisitions] by the standard of the antitrust laws." 321 U. S. at 85-86. The problem is one of accommodation of § 5(2) and the antitrust legislation. The Commission remains obligated to "estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed [acquisition] and consider them along with the advantages of improved service [and other matters in the public interest] to determine whether the [acquisition] will assist in effectuating the over-all transportation policy".' 321 U. S., at 87.
>
> "The same criteria should be applied here to the proposed merger. It matters not that the merger might otherwise violate the antitrust laws; the Commission has been authorized by the Congress to approve the merger of railroads *if it makes adequate findings in accordance with the criteria quoted above* that such a merger would be 'consistent with the public interest.'" (Italics ours.)

The Monon has contended throughout that this acquisition violates the antitrust laws. No findings have been made as to this contention. This order, therefore, "ignores" the antitrust laws and fails to make any accommodation of Section 5(2) with the antitrust laws.

Monon has been summarily dismissed as inconsequential by the Commission and the District Court in this control proceedings involving two railroad giants and the C&EI, which is twice the size of the Monon. To further strengthen these Goliaths to the serious damage of Monon, its exclusive shippers and those cities and villages relying exclusively on the Monon for service not only offends the basic concept of fair play but the serious weakening and possible destruction of the Monon Railroad violates the public interest requirement of Section 5(2) of the Act and the antitrust laws.

VIII.

Monon adopts the additional questions set forth in the Jurisdictional Statement of the Illinois Central Railroad Company as though fully set forth herein.

CONCLUSION.

The questions here presented are of utmost importance because of the many pending mergers of railroads in which numerous conditions have been imposed by the Commission. The District Court's opinion, if left unchanged, can only result in confusion as to the status and validity of such conditions. Authorization of MoPac's control of the C&EI was specifically conditioned on L&N obtaining the Evansville Line (App. pp. 67a, 68a, 92a). If the public interest issue is still open to Monon, as the District Court has held, then MoPac's authorization cannot be final because MoPac's authority is predicated on L&N obtaining the Evansville Line. If MoPac's authority is deemed final, the public interest issue has been disposed of as to Monon without a hearing. The District Court held that the public interest issue had been determined and yet held that the Monon could raise it later. This confusion can only be eliminated by a return to The Administrative Procedure Act (5 U. S. C. § 1007(b)) and the previous decisions of this Court, both of which require basic findings as to any condition imposed. Monon respectfully requests that probable jurisdiction be noted and the decision below be reversed.

Respectfully submitted,

JOHN B. GOODRICH,
JAMES H. HAWK,
ROBERT THORSEN,
Attorneys for Monon Railroad.

Of Counsel:
MADIGAN AND THORSEN,

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PAGE

APPENDIX I.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

ILLINOIS CENTRAL RAILROAD COMPANY, MONON RAILROAD and ST. LOUIS SOUTHWESTERN RY., *Plaintiff and Intervening Plaintiffs,* *vs.* UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, MISSOURI PACIFIC RAILROAD COMPANY, CHICAGO & EASTERN ILLINOIS RAILROAD, LOUISVILLE AND NASHVILLE RAILROAD COMPANY and LEON LEIGHTON, *Defendants and Intervening Defendants.*	No. 65 C 1393

DECREE.

This cause having come on for trial before the Court, consisting of three judges convened pursuant to law, and the Court having reviewed the evidence and having considered the briefs and arguments of counsel for the parties, and having rendered and filed its opinion herein, and being fully advised in the premises,

IT IS ORDERED, ADJUDGED AND DECREED that the order of the Interstate Commerce Commission entered in Finance Docket Nos. 21755, 21892 and 21980 on February 16, 1964, be, and it is hereby, affirmed.

ENTER:

ELMER J. SCHNACKENBERG,
Circuit Judge.

BERNARD M. DECKER,
District Judge.

DATED: August 4, 1966.

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Nos. 688

Supreme Court of the United States

OCTOBER TERM, 1966

ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant,*

v.

UNITED STATES OF AMERICA ET AL., *Appellees.*

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, *Appellant,*

v.

UNITED STATES OF AMERICA ET AL., *Appellees.*

MONON RAILROAD, *Appellant,*

v.

UNITED STATES OF AMERICA ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

APPENDICES 1 AND 2 TO JURISDICTIONAL STATEMENTS

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October 1966

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APPENDIX 1

Opinion of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 65 C 1393

ILLINOIS CENTRAL RAILROAD COMPANY,
MONON RAILROAD AND ST. LOUIS SOUTHWESTERN RY.,
Plaintiff and Intervening Plaintiffs,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, MISSOURI PACIFIC RAILROAD COMPANY, CHICAGO & EASTERN ILLINOIS RAILROAD, LOUISVILLE AND NASHVILLE RAILROAD COMPANY AND LEON LEIGHTON,
Defendants and Intervening Defendants.

Before SCHNACKENBERG, Circuit Judge, and CAMPBELL, Chief District Judge, and DECKER, District Judge.

DECKER, District Judge. Illinois Central Railroad ("IC") brings this suit to set aside an order of the Interstate Commerce Commission ("Commission"). Pursuant to 28 U.S.C. §§ 2284 and 2321-2325 the matter was tried before a three-judge court. The order, under § 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), authorized the Missouri Pacific Railroad ("MoPac") to acquire control of the Chicago & Eastern Illinois Railroad ("Eastern"), with the condition that Eastern then negotiate to sell to the Louisville & Nashville Railroad ("L&N") the Eastern Evansville line. The St. Louis Southwestern Ry. ("Cotton Belt") intervenes as a plaintiff; MoPac, Eastern and a stockholder of Eastern intervene as defendants. In addition, the Monon Railroad and L&N intervene as a plaintiff and a defendant, respectively, to argue that portion of the Commission's order dealing with the sale of the Evansville line.

Eastern is a comparatively short, bridge and terminal railroad running south from Chicago to East St. Louis and Thebes, Illinois, on the west, and to Evansville, Indiana, on the east. On a map its routes roughly resemble an inverted letter "Y." Its lines are in an "end-to-end" relationship with the lines of MoPac and L&N, neither of which now has access to the Chicago gateway over its own track. Eastern's lines are in a "side-by-side" relationship with the lines of IC, and if Eastern's lines are included in the MoPac and L&N systems, these two large railroads can for the first time compete with IC for substantial long line traffic over tracks entirely controlled by them.

In 1962, when the record in this case was made before a hearing examiner, Eastern was in serious financial difficulty. The examiner found that "practically every principal party in the proceedings herein predicates its individual interests upon convictions that Eastern's financial position is precariously weak, and that immediate substantial assistance is imperative to protect its ability to provide adequate transportation service."[1] The Commission found that control of Eastern by a major long-line railroad which had an interest in preservation of Eastern and modernization of its facilities would be in the public interest. Eastern's future as well as the interests of shippers and the development of a sound national transportation system were found to be better served by an "end-to-end" affiliation with MoPac than by a "side-by-side" affiliation with IC, one of Eastern's competitors.

Although these proceedings concerned authority to gain control, MoPac had already acquired substantial quantities of Eastern securities when the control application was filed in 1961. At the time of the 1962 hearing, the examiner found that MoPac and its parent corporation, Mississippi River Fuel Corp., were beneficial owners of the following proportions of Eastern securities: 17.2% of the common

[1] Excerpts from Examiner's Report, p. 58.

stock, 31.42% of the class A stock and 8.29% of the Convertible 5% General Mortgage Income Bonds.[2] Approval by two-thirds of the class A stock voted at a meeting was required for certain Eastern corporate actions (*e.g.*, mergers, certain leases and certain sales of assets). Since less than 90% of that stock was voted at the typical Eastern meeting, MoPac had sufficient holdings to prevent the needed two-thirds majority support, and thereby veto proposed action.

Eight months after the major acquisition of Eastern securities, MoPac established an "Independent Voting Trust" into which all of the securities were placed, with instructions that "the trustee shall vote the securities of C&EI so that at all times . . . there shall, to the best of its knowledge, be entire independence of directors and management between MoPac and C&EI." Subsequent to the examiner's hearing, on February 20, 1964, MoPac acquired additional Eastern securities which were conveyed immediately to the trustee.

The Commission held that MoPac had illegally acquired some measure of control of Eastern by purchasing the class A stock and the veto power it carried without first obtaining Commission approval. Control of one railroad by another without Commission permission under § 5(2) is a violation of § 5(4) of the Interstate Commerce Act, 49 U.S.C. § 5(4); a common remedy is denial of the offending carrier's § 5(2) control application. However, MoPac's violation was held to have been comparatively minor and to have terminated upon creation of the trust eight months after the securities were acquired. The Commission held that control need not be denied in this case simply because of a § 5(4) violation in light of the great public benefit flowing from MoPac control of Eastern.

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[2] Hereafter holdings of MoPac and its parent are referred to as holdings of MoPac alone.

IC labels MoPac's § 5(4) violation flagrant rather than minor, and argues that the Commission made an error of law when it found the trust effective to insulate Eastern from MoPac control. IC claims that a proper evaluation of the seriousness of MoPac's violation in light of the legal inefficacy of the trust requires strict enforcement of § 5(4) and denial of MoPac's § 5(2) control application. While IC challenges the findings that shippers and the national transportation system will be served best by MoPac control, the primary thrust of the complaint is that the Commission acted arbitrarily on the basis of a mistake of law in holding MoPac's § 5(4) violation so trivial that the public interest required an award of control to MoPac rather than divestiture.

IC further argues that the Commission acted arbitrarily in refusing to reopen the record to receive evidence on two points: 1) alleged further MoPac § 5(4) violations; 2) Eastern's substantially improved financial condition since the 1962 hearing. IC claims that this case must, at the very least, be remanded to the Commission for further consideration in light of this proffered evidence.

Finally, the provision in the order for compulsory negotiations between Eastern and L&N for sale of the Evansville line is said to be beyond the Commission's legal power to enter.

We hold that the Commission did not err in finding the trust effective, that it did not clearly abuse its discretion in denying the petitions to reopen the record, that its provision for negotiations for sale of the Evansville line was legal, and that there is substantial evidence in the record in support of the Commission's findings. Therefore, we affirm the order of the Commission.

I

This case requires resolution of the conflict between §§ 5(2) and 5(4) [3] of the Interstate Commerce Act which arises whenever an applicant seeks authority to acquire control of a railroad in a situation where the applicant has already acquired some measure of control without prior Commission approval. While § 5(2) directs Commission approval of a proposed control transaction if it will be "consistent with the public interest," § 5(4) declares it unlawful to enter into such a transaction without § 5(2) approval. Denial of a § 5(2) application because of a § 5(4) violation may deprive the public of important transportation benefits; approval of a § 5(4) *fait accompli* rewards the lawbreaker. The Commission is not a stranger to this dilemma.

The Commission weighs a § 5(4) violation when it determines whether a control transaction will be in the public interest. In its leading case on this question, the Commission said:

> "The public interest is concerned not only with improvements in transportation service, but also with the maintenance of respect for and the observance

[3] "§ 5, par. (4). *Control effected by other than prescribed methods.* It shall be unlawful for any person, except as provided in paragraph (2) of this section, to enter into any transaction within the scope of subdivision (a) of paragraph (2) of this section, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5) of this section, the words 'control or management' shall be construed to include the power to exercise control or management."

> of the law. If the Frisco is permitted to retain the fruits of its unlawful conduct, and we sanction such conduct, which we consider to have been in flagrant disregard of the law, others will be encouraged to pursue a like course and to present a *fait accompli* for our approval. Obviously, such is not in accord with the intent of the statute; i.e., that we pass upon 'proposed' acquisitions of control prior to their consummation, including the justness and reasonableness of the terms upon which such control is to be acquired. If the indicated practice were generally followed, our administration of the statute in the public interest would be seriously hindered, if not defeated." *Central of Georgia Railway Co. Control,* 307 ICC 39, 43-44 (1958).

See also, *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115, 128-29 (1962). Where the statutory violation is flagrant, in open defiance of Commission authority, the public interest may require denial of a § 5(2) application. *See e.g., Central of Georgia Railway Co. Control,* 307 ICC 39 (1958); *Buckingham Transportation Inc.—Control and Merger,* 90 MCC 731, 741 (1962); *Coldway Food Express, Inc.—Control and Merger,* 87 MCC 123 (1961); *Houff—Control,* 80 MCC 637 (1959). However, where the evidence shows that the applicant acted in good faith, the public interest in strict enforcement of § 5(4) may be comparatively small. *See e.g., Bringwald—Control,* 90 MCC 11 (1962) (control acquired after consultation with ICC supervisor); *Yellow Cab Co.—Control,* 87 MCC 96 (1960) (violation of statute "resulted primarily from erroneous advice"); *Gate City Transport Co.—Control,* 87 MCC 591 (1961) (control acquired gradually by one truck-owner helping his ailing truck-owner friend). *See also, Central of Georgia Railway Co. Control,* 307 ICC 39, 45-46 (1958) (dissenting opinion).

The Commission applies a balancing test. The preference for denying control to violators of § 5(4) "will give way to a clear showing of public interest in approval." *Gilbert-*

ville Trucking Co. v. *United States,* 371 U.S. 115, 129 (1962); *Central of Georgia Railway Co. Control,* 307 ICC 39 (1958). *Compare Buckingham Transportation Inc.—Control and Merger,* 90 MCC 731 (1962), *with DeBardeleben Marine Corp.—Control,* 312 ICC 69 (1960). Thus, a mere similarity in the degree of flagrancy of a violation between cases does not dispose of the problem since the public benefits of control may be greater in one case than in another.

The Commission minimized MoPac's § 5(4) violation and maximized the public benefit flowing from MoPac control of Eastern:

> "The record makes it abundantly evident that, except for the limited veto power it possessed through its holdings of the class A stock, Missouri Pacific did not otherwise have power to control Eastern, and that it did not exert any apparent influence on Eastern's management, prior to or after the creation of the voting trust."[4]

There is sufficient evidence in the record to support these conclusions. While neither the negative character of the control nor MoPac's self-imposed restraint are relevant in determining whether §5(4) was violated, both factors may properly be considered in evaluating the flagrancy of the violation. The Commission considered them to be mitigating factors here.

Important to the Commission's conclusion that MoPac was not a flagrant violator of the law was the finding that the §5(4) violation was *temporary.* The Commission was impressed by MoPac's conveyance of Eastern securities to the Marine Midland "independent voting trust." MoPac's purpose in creating the trust is recited in the trust agreement, as follows:

> "MoPac, without admitting that its purchases and ownership of shares of the capital stock of [Eastern]

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[4] Commission opinion, p. 53.

> constitute control of, or power to control, said Company, wishes to avoid any questions or charges that have or may arise by reason of its ownership of such [Eastern] stocks; and to that end desires to place in trust any shares of capital stock issued by [Eastern] and purchased or otherwise acquired by MoPac, so that MoPac shall not be enabled, until such time as control by it of [Eastern] may be authorized in accordance with applicable provisions of law, to exercise any voting rights incident to any stocks of [Eastern] now owned or hereafter acquired by it."

The agreement requires the trustee to vote the Eastern securities independently, as follows:

> "The Trustee shall vote the securities of [Eastern] so that at all times during the continuance of this Trust Agreement there shall, to the best of its knowledge, be entire independence of directors and management between MoPac and [Eastern], and the Trustee shall not exercise the voting power of said securities of [Eastern] in such way as to its knowledge cause any dependence or intercorporate relationship between said two companies."

The drafters of the agreement attempted to create an irrevocable trust. The Commission described the revocation provisions of the trust, as follows:

> "The trust, during its term, is irrevocable, and is to remain effective until the occurrence of events specified therein, but none other. The stated events are (1) a sale of all the deposited securities (sales may be made only to persons not affiliated with Missouri Pacific), (2) the delivery to the trustee of an order of this Commission authorizing Missouri Pacific to acquire control of Eastern or to purchase any of its properties, or authorizing the release of the securities

for any reason, or (3) passage of 10 years (ending April 20, 1972)." [5]

L&N used a similar trust for its substantial holdings of Eastern securities.

IC, agreeing that the trust agreement asserts irrevocability, argues that the trust was in fact and law revocable at MoPac's will. According to IC, MoPac had only to notify the trustee that the trust was to end and the full power to control Eastern residing in the class A stock would immediately revert to MoPac's hands. Since the power to revoke the trust is the power to obtain control of Eastern, IC claims that MoPac's §5(4) violation never ceased and continues to this day.

Inasmuch as MoPac is settlor and sole beneficiary, this trust would normally come within the general rule summarized in the Restatement (Second), Trusts § 339, and followed in numerous cases:

> "If the settlor is the sole beneficiary of a trust and is not under an incapacity, he can compel the termination of the trust, although the purposes of the trust have not been accomplished."

See Restatement (Second), Trusts, Appendix § 339; Bogert, Trusts § 1004; 3 Scott, Trusts § 339. *See e.g., Universal Carloading & Distributing Co.* v. *Railroad Retirement Board,* 172 F.2d 22, 26 (D.C.Cir. 1948); *Moore* v. *First National Bank & Trust Co. of Macon,* 218 Ga. 798, 130 S.E. 2d 718, 721-22 (1963); *Bixby* v. *California Trust Co.,* 33 Cal.2d 495, 202 P.2d 1018, 1019 (1949); *Vlahos* v. *Andrews,* 362 Ill. 593, 1 N.E.2d 59 (1936). *See also,* § 23,

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[5] Commission opinion, pp. 53-54. The Commission did not adopt this assertion of irrevocability at this point in its opinion as a correct or controlling rule of law; the Commission was simply reviewing what the trust agreement said on its face. This was a passage of description, not judgment.

New York Personal Property Law (1909, as amended 1951); *Robinson* v. *New York Life Insurance & Trust Co.*, 133 N.Y.S. 257, 262 (1911); *but see In re. Mordecai's Trust*, 24 Misc.2d 668, 201 N.Y.S.2d 899, *aff'd* 12 App. Div. 2d 449, 210 N.Y.S.2d 478 (1960).

Defendants concede that this is the general rule, but they argue that "this maxim is not applicable . . . to a commercial trust designed to achieve a specific business purpose, particularly where other persons or entities have an interest in having the purpose fulfilled." The Commission and the public are said to have a "direct interest in having the purpose and terms of the trust carried out." Substantial reliance is placed on *Hearst* v. *American Newspapers*, 51 F.Supp. 171 (D.Del. 1943), where the settlor and sole beneficiary of a trust was not permitted to terminate his trust under extra-ordinary circumstances. IC, in response, relies on *H. M. Byllesby* v. *Doriot*, 25 Del. Ch. 46, 12 A.2d 603 (1940), in support of the general rule favoring revocability.

The trust was created on April 20, 1962; the Commission was notified of it in a petition for leave to amend MoPac's § 5(2) application on April 23, 1962. In effect, the Commission was asked to rely on the terms of the trust to absolve MoPac of any § 5(4) violation based on ownership of Eastern securities, and to find that the public interest was not endangered by MoPac's holdings. It may well be that having asserted irrevocability to the Commission to protect itself, MoPac was estopped from changing its position and asserting elsewhere that the trust was revocable. *Compare Hearst* v. *American Newspapers*, 51 F.Supp. 171 (D.Del. 1943). Under the circumstances of this case, the trust might be considered irrevocable.

This debate on the revocability of trusts has little to do with this case. As a matter of law, this trust could be declared legally revocable without resolving the important

trust question before this court. That question, in plain terms is whether the "independent voting trust" effectively insulated Eastern from MoPac control. This is a question addressed more to the realities of the railroad business than the niceties of trust law.

The Commission was primarily concerned with *effectiveness*. The following findings were made:

> ". . . the transfer of legal title to the unlawfully acquired stock and securities of the Chicago & Eastern Illinois Railroad Company to The Marine Midland Trust Company of New York as trustee effectively divested the Misssouri Pacific Railroad Company and the Mississippi River Fuel Corporation of the power to control or manage the Chicago & Eastern Illinois Railroad Company and thereby terminated the violation; and . . . the holding of legal title to stock and securities of the Chicago & Eastern Illinois Railroad Company by The Marine Midland Trust Company of New York and The Bank of New York as trustees, respectively, for the Missouri Pacific Railroad Company and the Louisville and Nashville Railroad Company in accordance with the provisions of the trust agreements approved herein for each, effectively insulated the Missouri Pacific Railroad Company and Mississippi River Fuel Corporation, and the Louisville and Nashville Railroad Company from the control or power to control the Chicago & Eastern Illinois Railroad Company." [6]

The trust, along with other self-imposed restraining measures, was found to be "successful to the extent that none of the acquired power to control the affairs of Eastern was actually, or could be, exercised" by MoPac. The Commission further stated:

> "Also warranted are findings that the trustees named by Missouri Pacific and [L&N] were and are qualified

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[6] Commission opinion, pp. 61-62.

> to undertake the fiduciary positions involved and have faithfully carried out the terms of their respective trust agreements in such a way as to successfully insulate Missouri Pacific and [L&N], individually and together, from the power to control Eastern, and that neither Missouri Pacific nor [L&N] have acquired control of Eastern through the trusts or otherwise, except for the instance already noted." [7]

This is the language of reality and practicality. The Commission focused on the *success* and *effectiveness* of the trust. When the Commission held that "the violation ceased upon the effectuation of the trust" and that "from and after the time the trust arrangement was put into effect, Missouri Pacific has had neither control nor power to control the affairs of Eastern," the Commission was concluding that §5(4) was no longer offended once the trust was created. The Commission's opinion contains no indication that the *legal* irrevocability of the "independent voting trust" was critical to the conclusion that the trust was effective for purposes of § 5(4).

The question is whether it was arbitrary, or a mistake of law, for the Commission to conclude that the "independent voting trust" was sufficient to effectively avoid a §5(4) violation by MoPac. We think the Commission correctly approved this trust, regardless of the technical rules of the law of trusts.

The power of the Commission to respond to conditions of illegal control is practically plenary under the Interstate Commerce Act. The Commission has the power to initiate an investigation, 49 U.S.C. §5(7), order termination of a violation, 49 U.S.C. §5(7), seek an injunction in a United States District Court, 49 U.S.C. §5(8), and refuse approval of a *fait accompli,* 49 U.S.C. §5(2), *Gilbertville*

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[7] Commission opinion, p. 57.

Trucking Co. v. *United States,* 371 U.S. 115 (1962). Of particular importance here, the Commission is charged with the task of measuring the moral turpitude of a carrier which violates §5(4).

Were MoPac to revoke this trust, the Commission could deal swiftly with the condition of illegal control. The power thus obtained would be evanescent. A MoPac revocation would endanger the very goal MoPac seeks: control of Eastern. It is beyond reasonable comprehension to suppose that MoPac would revoke this trust prior to gaining Commission approval. The court can imagine no credible hypothesis upon which the possibility of MoPac revocation can be based, and IC has provided us with none.

For the purposes of §5(4), this practical barrier to revocation is sufficient. It amounts to irrevocability. Whether or not this trust could be revoked at MoPac's will, the complete answer for purposes of the Interstate Commerce Act is that it would not be revoked. This holding in no way subverts the purpose of §5(4). Congress created a statutory scheme to reach the elaborate corporate devices used to centralize control over railroads without Commission supervision. *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115, 124 (1962). Temporary control of Eastern by a trustee charged with the specific duty of independent action is not of itself the first step on the road to centralized control of railroads. The use of a trust of this type with an independent trustee *pending* Commission approval of a control arrangement is the antithesis of effecting control without Commission supervision.

Cotton Belt argues that no other railroad "would be likely, as a practical matter, to even consider spending time and money on merger negotiations and studies as long as the MoPac held out the veto power (whether in its own hands or in that of its trustee) found by the Commission." However, as long as the trustee is in fact independent and therefore free to vote its stock in favor of

an arrangement with a railroad other than MoPac, Cotton Belt's argument is insufficient to raise a §5(4) problem. The Commission found on the basis of substantial evidence that the trustee was qualified to carry out its contractual duty of independence and had done so. We cannot overturn that finding.

We hold that the Commission properly found the MoPac "independent voting trust" to be effective insulation between MoPac and Eastern. This finding is neither arbitrary nor in conflict with the law. In this situation, the extent of MoPac's §5(4) violation is a matter depending on events prior to the creation of the trust. In light of the efficacy of the trust, the Commission was justified in considering as a mitigating circumstance the fact that the §5(4) violation was temporary.

The Commission was also justified in finding evidence of good faith in the particular way in which MoPac established the trust. The Commission made the following observation:

> "The trust agreement was drafted in terms obviously designed to meet the requirements for independent voting trusts heretofore approved and/or prescribed by the Commission in a number of proceedings involving the question of one carrier's control of another where the object of the trust was to bar the beneficial owner of the securities from participation in the control, management and operation of the issuing carrier. See *Interstate Commerce Commission* v. *Baltimore & O. R. Co.*, 183 I.C.C. 165, *Wabash R. Co. Control*, 247 I.C.C. 365 and *New York, C. & St. L. R. Co. Control*, 295 I.C.C. 703." [8]

The Commission was correct in saying that "unlike the flagrant disregard for the law which characterized the sit-

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[8] Commission opinion, p. 54.

uation in *Central of Georgia Ry. Co. Control,* 307 ICC 39 (1958), there are in the present record a number of factors mitigating the unlawful conduct." However, even if MoPac's behavior was as reprehensible as the behavior condemned in the *Central of Georgia* case, denial of MoPac's control application would not necessarily be required. The Commission balances the public interests voiced in both §§5(2) and 5(4); the magnitude of the public benefit flowing from a particular control arrangement has some impact on the response to a §5(4) violation. It is this question of public benefit to which we now turn.

II.

The Commission said:

> "In our opinion, the public interest considerations in these proceedings overwhelmingly favor approval of Missouri Pacific's control of Eastern subject to conditions for inclusion of [L&N] notwithstanding the section 5(4) violation." [9]

The function of this court in reviewing this determination of the Commission is sharply restricted. "It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done." *United States* v. *Pierce Auto Freight Lines, Inc.,* 327 U.S. 515, 536 (1946); 5 U.S.C. §1009(e). "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co.* v. *United States,* 292 U.S. 282, 286-87 (1934). Once this court finds substantial evidence in support of the Commission's findings, it cannot go further and inquire into the soundness of the Commission's reasoning or the wisdom of the result. *Virginian Ry.* v. *United States,* 272 U.S. 658, 663 (1926); *United States* v. *New River Co.,* 265 U.S. 533, 542 (1924).

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[9] Commission opinion, p. 58.

The Commission found that an "end-to-end" affiliation with MoPac would lead to modernization and substantial improvement in Eastern's physical plant and its ability to serve shippers and other connecting railroads. In contrast, the Commission found that "side-by-side" affiliation with IC, one of Eastern's competitors, would lead to Eastern's "eventual subjugation and disintegration . . . or its continued operation as a self-restricted, financially weak system as at present." These findings are fully supported by the evidence in this case.

The finding that the MoPac control arrangement would provide substantial new service for large numbers of shippers in the southeast and southwest without significant injury to competing carriers is also supported by substantial evidence in the record. In particular, the testimony of numerous shippers, municipalities and others in support of MoPac control of Eastern is convincing support for the Commission's conclusion.

We find no support for IC's contention that MoPac control, rather than IC control, is subversive of the national transportation policy. Great emphasis must be placed on obtaining an adequate, efficient and economical system of transportation, as IC argues, but IC has not shown that the Commission erred in concluding that MoPac control of Eastern would best effectuate that policy. We find substantial evidence in support of the conclusion that MoPac control is the clearly preferable future status for Eastern.

In light of the support in the record for these findings, we cannot say that the Commission improperly struck the balance between the requirements of §§5(2) and 5(4). The Commission's result is not arbitrary or in violation of the law, and therefore it must be affirmed.

III.

MoPac did not terminate its transactions in Eastern securities upon creation of the "independent voting trust."

Following the 1962 hearing by the examiner, further Eastern securities were acquired by MoPac and two investment firms with which it did business. Dissenting Commissioner Tucker, and the IC, argue that the Commission clearly abused its discretion when it refused to reopen the record to receive evidence of these later purchases.

IC offered evidence of these new acquisitions in a petition to reopen the record filed on August 20, 1964, seven months before the Commission decided this case. Substantially the same facts were set forth in a similar petition filed by the Commission's Bureau of Inquiry and Compliance on August 31, 1964. It is clear from MoPac's reply on September 2, 1964, and IC's response to that reply on September 6, 1964, that the central facts of the additional transactions are not in dispute.

On November 22, 1963, MoPac entered into an option agreement with Eastman Dillon, Union Securities & Co. to purchase $3,000,000 of Eastern Convertible 5% General Mortgage Income Bonds already owned by Eastman Dillon. On December 17, 1962, MoPac entered into an option agreement under which Dempsey-Tegeler & Co. purchased $1,000,000 of Eastern's convertible bonds for ultimate sale to MoPac. Both options were exercised by MoPac on February 20, 1964, and the bonds were immediately transferred to MoPac's "independent voting trust," together with another $878,000 worth of bonds purchased from Dempsey-Tegeler on the same date which were not covered by the original option agreement. The Commission was notified of both the option agreements and the $4,878,000 in purchases on February 24, 1964.

At times during the year before IC filed its petition, Eastman Dillon and Dempsey-Tegeler held for their own accounts a total of 59,900 shares of Eastern common stock. IC charges that these holdings by MoPac's "long-term investment banking associates"—the Bureau of Inquiry and

Compliance called them "friendly brokers"—must be included in MoPac's total interest in Eastern.

IC adds these bonds and shares of stock to those purchased by MoPac in 1961 (and presently held in trust), converts all of MoPac's convertible bonds into common stock (but no other outstanding convertible bonds), and concludes that MoPac has acquired "mathematical" power to control Eastern by acquiring the power to obtain more than 50% of Eastern's outstanding common stock. IC claims that such a startling maneuver requires reopening of the record, particularly in light of the Commission's finding that MoPac was guilty of only a minor infraction of §5(4).

When it refused to reopen the record in its order of February 16, 1965, the Commission had before it all of the facts set forth in the petitions and the repues. The Commission was entitled to consider these facts and their potential impact on the merits of the case. *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, 535-36 (1946). After finding that the "independent voting trust" was effective for the purposes of §5(4) and that MoPac had refrained from attempting to influence Eastern's affairs, the Commission ruled, as follows:

> "These findings render moot the issues raised in the petitions filed by Illinois Central and the Bureau wherein further hearing is sought for the purpose of establishing that, by its trustee's acquisition of additional of Eastern's stock and convertible bonds subsequent to the hearing, Missouri Pacific and persons associated with it have acquired the power to control Eastern." [10]

Petitions for reopening and rehearing are addressed to the Commission's discretion. "Only a showing of the clear-

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[10] Commission opinion, p. 57.

est abuse of discretion could sustain an exception to that rule." *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, 535 (1946). The Supreme Court has ordered reopening in only one case: *Atchison, T. & S. F. R. Co.* v. *United States,* 284 U.S. 248 (1932), where the Great Depression had intervened between the hearing and the order. But that case was "promptly restricted . . . to its special facts . . . and it stands virtually alone." *Interstate Commerce Commission* v. *Jersey City,* 322 U.S. 503, 515 (1944). *Accord, United States* v. *Northern Pacific Ry. Co.,* 288 U.S. 490 (1933); *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349, 389 (1936) (concurring opinion of Mr. Justice Brandeis). IC cites only one case in which reopening was required in reliance on *Atchison.* That case is *State of Oklahoma* v. *United States,* 193 F. Supp. 261 (W. D. Okla. 1960), decided by a divided three-judge court, which is clearly distinguishable from the present case. In contrast, numerous cases have followed the strict rule of *Jersey City, supra, Pierce Auto, supra* and *Northern Pacific, supra.*

The question is whether the Commission was guilty of "the clearest abuse of discretion" when it denied the petitions to reopen to receive evidence of new MoPac Transactions in Eastern securities. We hold that the Commission did not abuse its discretion. Once the effectiveness of the "independent voting trust" was established, it was not an abuse of discretion to find that evidence of subsequent purchases which were immediately poured into the trust would have no impact on the result in the case. If the trust was sufficient to terminate the prior §5(4) violation, the Commission could reasonably find that no new violation could have resulted from the purchase of additional securities for that trust.

If the potential voting power of the newly acquired bonds in trust is deducted from MoPac's alleged new voting strength, the Commission could reasonably find that evi-

dence of the small common stock holdings of Eastman Dillon and Dempsey-Tegeler would have no impact on the merits of the case. Even if charged to MoPac, these holdings would be insufficient to amount to the control required to violate §5(4). Furthermore, the petitions do not contain sufficient allegations to justify a hearing on possible MoPac control deriving from these holdings by others.

Although use of the trust on February 20, 1964, may reasonably be found to have been sufficient to circumvent additional § 5(4) violations, events occurring prior to use of the trust are not protected in the same way. It appears that MoPac had access to the bonds purchased by Eastman Dillon and Dempsey-Tegeler pursuant to the option agreements scored to MoPac's purchase of those bonds on February 20, 1964. Whatever power to control Eastern resided in those convertible bonds must be charged to MoPac for the period just prior to that date.

The November 22, 1963, agreement with Eastman Dillon obligated MoPac to "purchase at any time within two years from the date hereof, $3,000,000 principal amount" of Eastern bonds already owned by that firm. Eastman Dillon could require MoPac to purchase some bonds "from time to time." A single barrier was erected to purchase at MoPac's will: the agreement was inoperative if "MoPac shall in its opinion be legally unauthorized to make such purchase." We do not find MoPac's legal opinion sufficient insulation between MoPac and the power inherent in the bonds held by Eastman Dillon. Consequently, from November 22, 1963, until February 20, 1964, the potential control of Eastern which those bonds represented must be charged to MoPac.

The same result is required with respect to the Dempsey-Tegeler bonds for a different reason. The agreement explicitly provided that the Eastern bonds were to be held by Dempsey-Tegeler "until such time as Missouri Pacific

shall receive final and effective authority from the Interstate Commerce Commission to control" Eastern. Despite this clear injunction, MoPac purchased these bonds on February 20, 1964, even though the Commission's final and effective authority had not been granted. It appears that the agreement's shield between MoPac and the bonds was a mere gossamer with no binding effect; there was no reliable insulation between MoPac and the power inherent in the bonds. Therefore, that power must be charged to MoPac, for the period from the date of purchase by Dempsey-Tegeler until February 20, 1964.

Consequently, at some time shortly before February 20, 1964, MoPac had the power to obtain and convert no more than $4,878,000 of Eastern convertible bonds. Assuming conversion by MoPac and no other conversion of outstanding convertible bonds, MoPac had access to 32% of the Eastern's common stock through the bonds, and the power over Eastern's affairs associated with that much stock.

The Commission, with all of these facts before it, found that MoPac had not "acquired control of Eastern through the trusts or otherwise." In considering the petitions to reopen, the Commission was entitled to consider not only the mathematical power, if any, inherent in this quantity of stock, but also the conditions under which MoPac had access to it. While MoPac tread close to the line of another §5(4) violation, we cannot hold that the Commission clearly abused its discretion in finding no sufficient new §5(4) violation raised by the facts stated in the petitions. Although we may disagree with this ruling, our scope of review is limited to determining whether there is warrant in the law and facts for the result reached. *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, 536 (1946). We hold that there is. The Commission's order of June 23, 1966, denying St. Louis Southwestern Railway's petition for reopening and rehearing was not a clear abuse of discretion for the same reasons.

IV.

The next question is whether the Commission clearly abused its discretion in denying the petition to reopen to receive evidence of improvement in Eastern's financial condition since the 1962 hearing. The examiner's recommendation and the Commission's decision in this case were based largely on 1961 data which showed Eastern's condition to be "precarious." It is beyond question that the Commission considered Eastern's need for immediate financial rescue to be a determining factor in this case.

> "Of paramount importance in these deliberations is the impact our decision will have upon the public interest. A denial of the applications herein, on whatever ground, would leave Eastern independent, as a relatively small, financially weak, and physically deficient railroad lacking the reserve and source of ready assistance needed to successfully compete with the relatively large, well-equipped, vigorous, long-line railroads operating in the same territory, and with the increasingly dynamic carriers of the other modes of transportation.
>
> "The need, in present day railroading, for high-speed and heavy-duty facilities, for expeditious and direct long-line transport, for specialized equipment and tailor-made service, and for the other qualities demanded by a shipping public engaged in the keen competition which marks our national economy, makes it essential that Eastern have access to revitalizing resources outside of itself, if it is to survive as a positive and contributing element of the national transportation system. To deny Eastern the relief and assistance offered through the several proposals now before us, would leave it foundering and of diminishing value to either the public generally or to its own security holders. Twice since the turn of the century Eastern has had to be rescued from bankruptcy by a re-

organization—in 1922 and again in 1941; and now, in these proceedings we have the opportunity to approve remedial proposals capable of preventing a recurrence, at least in the foreseeable future.

"Eastern's preservation as a prosperous competitive rail carrier under the control of Missouri Pacific and its corporate parent, Mississippi Fuel, is clearly in the public interest—certainly far more so than would be its eventual subjugation and disintegration under the control of Illionis Central and Illinois Industries, or its continued operation as a self-restricted, financially weak system as at present." [11]

On October 16, 1963, Chicago & North Western R. Co. ("C&NW"), an intervenor in the proceedings before the Commission, filed a "motion to reopen or to take official notice," in an effort to bring to the Commission's attention a substantial improvement in certain elements of the Eastern financial picture. Replies filed by MoPac, L&N and Dempsey-Tegeler & Co., then a holder of Eastern securities, challenged the significance of the change in conditions. The petition was denied. Since 1963, Eastern has continued to show improvement in many aspects of its operations.

The record is unquestionably stale. However, that fact alone is insufficient to justify an order compelling the Commission to reopen. Records in long and complex cases are inevitably outdated on the day of decision and the Commission has broad discretion to refuse to permit further delay to obtain evidence of changed conditions. *Interstate Commerce Commission* v. *Jersey City,* 322 U.S. 503, 514-15 (1944). *Compare Atchison, T. & S. F. R. Co.* v. *United States,* 284 U.S. 248 (1932) (Great Depression, rehearing required), *with United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, 535 (1946) (World War II, rehearing denied).

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[11] Commission opinion, pp. 58-59.

The denial of a petition to reopen is clearly within the discretion of the Commission in a case where the offered new evidence is not likely to have an impact on the merits. The improvements in elements of Eastern's financial condition which C&NW offered to show could reasonably be found by the Commission on their face to be insufficient to signal permanent cure of the underlying, long-term financial weakness and deficiencies in equipment which were so important to the decision. Under these circumstances we cannot hold that the Commission is guilty of any clear abuse of discretion in denying the petition.[12] The Commission's order of June 23, 1966, denying St. Louis Southwestern Railway's petition for reopening and rehearing was not a clear abuse of discretion for the same reasons.

V.

Finally, the legality of the Commission's order with respect to Eastern's Evansville line must be considered. The order reads as follows:

> "[W]e do hereby . . . require, that Missouri Pacific, if it assumes control of Eastern, shall immediately thereupon (1) take all reasonable, necessary and appropriate steps to cause Eastern to negotiate in good faith for the sale to [L&N], of so much of Eastern's line of railroad, including branches, appurtenances and facilities as is set out in appendix C hereto, so that [L&N] would be enabled to provide service between Evansville and Chicago, including intermediate points and points on branch lines springing from Eastern's mainline between Evansville and Chicago, the negotiations to begin as soon as feasible and to be completed not later than one year after the effective date of our order herein; and (2) take such steps as are necessary to permit [L&N] to provide service between Evansville

[12] See *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 535 (1946).

and Chicago, including intermediate points and points on branch lines, under trackage or joint use rights temporarily, pending final determination of [L&N's] acquisition proceeding.

"[L&N] is to submit for consideration of this Commission, by an appropriate application under section 5(2) of the Act, any agreement reached in the negotiations, but, if the parties are unable to arrive at mutually acceptable terms within the period set for the negotiations, that fact shall be brought to the Commission's attention with the filing of the said application; and, in either event, the Commission, pursuant to the Act, shall determine equitable, just and reasonable terms consistent with the public interest, upon which [L&N] may accomplish the acquisition of the Eastern properties set out in appendix C. We shall retain jurisdiction to reopen these proceedings upon our own motion for the purpose of insuring that negotiations are conducted in good faith by the parties." [13]

This condition on MoPac control was imposed under §5(2)(d) of the Interstate Commerce Act, 49 U.S.C. §5(2)(d), which reads as follows:

"(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a pre-requisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a fiinding that such inclusion is consistent with the public interest."

IC argues that the Commission has in effect ordered an involuntary sale by Eastern of its Evansville line. Of course,

[13] Commission opinion, pp. 37-38.

the Commission does not have the power under §5(2)(d), or any other provision, to compel railroads to merge or sell their property against their will. *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298, 305-06 (1954). The Commission has frequently recognized this limitation on its power. *See e.g., Chesapeake & Ohio—Control—Baltimore & Ohio*, 317 ICC 261, 290 (1962); *Baltimore & Ohio R. Co. Operation*, 261 ICC 535, 544-45 (1945).

We do not read the Commission's order to force a sale of trackage by an unwilling Eastern. The sale will occur only when Eastern and L&N conclude satisfactory good faith negotiations. At the time of the contemplated sale, Eastern will be controlled by MoPac in accordance with the Commission's order, and will willingly participate in the transaction. MoPac's, and therefore Eastern's, consent must be presumed from MoPac's acquiescence in the conditions of the order. Consequently, the Commission's order with respect to the Evansville line is legal.

Intervenor Monon Railroad objects to the sufficiency of the Commission's findings on the question of the competitive effect of L&N acquisition of the Evansville line. Strictly speaking, we have before us only the question of the warrant in fact and law for the order requiring compulsory negotiations. It is not likely that mere negotiations will have any competitive effect whatsoever.

The Commission appears to have decided, as it was required to do, the question of the ultimate desirability of L&N control of the Evansville line. While the findings that L&N's competitors would not be significantly injured by the proposed sale are probably sufficient under cases such as *McClean Trucking Co.* v. *United States*, 321 U.S. 67, 87-88 (1944), and are probably supported by substantial evidence, we need not decide these questions today. Monon will have ample judicial protection if and when the final L&N §5(2) application for purchase of the Evansville line

is approved by the Commission. Monon can raise its objections at that time.

For the reasons hereinabove set forth in this opinion, the order of the Commission in Finance Docket Nos. 21755, 21892 and 21980 is affirmed.

ENTER:

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Circuit Judge

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District Judge

DATED: August , 1966.

Dissent

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLIONIS
EASTERN DIVISION

No. 65 C 1393

ILLINOIS CENTRAL RAILROAD COMPANY, MONON RAILROAD AND ST. LOUIS SOUTHWESTERN RY.,
Plaintiff and Intervening Plantiffs,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, MISSOURI PACIFIC RAILROAD COMPANY, CHICAGO & EASTERN ILLINOIS RAILROAD, LOUISVILLE AND NASHVILLE RAILROAD COMPANY AND LEON LEIGHTON,
Defendants and Intervening Defendants.

Before SCHNACKENBERG, Circuit Judge, and CAMPBELL, Chief District Judge and DECKER, District Judge CAMPBELL, C. D. J., dissenting:—

I would remand this case to the Commission for a reconsideration of Missouri Pacific's §5(4) violations in light of a corrected legal construction of the stock trust agreement.

In arriving at its final Order the Commission acknowledged that the Missouri Pacific had violated § 5(4) of the Act by acquiring control of Eastern. I agree with Judge Decker's learned majority opinion herein, that such a finding does not automatically require a disapproval of Missouri Pacific's §5(2) application to acquire control of Eastern. However, in stating the reasons for its final Order the Commission concluded upon what I believe was an erroneous legal predicate; that Missouri Pacific's violation was redressed or eliminated by its trust agreement with the Marine Midland Bank. The Commission, upon its legally erroneous conclusion and belief that the trust was irrevocable, found that the Missouri Pacific had

divested itself and relinquished control over its prior acquired Eastern stock. The Commission therefore, in reaching its public interest conclusion, in summarily dismissing the §5(4) violation, in finding a divestiture of control and in evaluating the good faith of Missouri Pacific did so on the basis of its conclusion that the trust was irrevocable.* The importance of this conclusion to the Commission's final determination can only be stated by the Commission and should not be conjectured by this court.

Interestingly, in rejecting the Cotton Belt's argument addressed to the practicalities of it or of other railroads considering merging with Eastern, first the Commission and now this court necessarily assumed that the trustees are independent. I feel that the legal correctness of such an assumption must be challenged where as here the trust is revocable.

The general rule of law applicable to trusts such as that created here where the settlor is the sole beneficiary is well stated by Judge Decker at page 13 of the majority opinion. I need not repeat or requote from §339 of the Restatement of the Law of Trusts. Such trusts are revocable at the will of the settlor-beneficiary.

Applying this principle of law to the instant facts it follows that Missouri Pacific had the right at any time to compel a termination of the trust; the Marine Midland Bank trust was not irrevocable and Missouri Pacific was not divested of control over its Eastern stock holdings.

Missouri Pacific's legal arguments which attempts to except or distinguish the Marine Midland Bank trust from

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* This court's majority opinion, page 12, footnote 5 characterizes one of the Commission's references to the trust as being irrevocable as purely descriptive and not conclusionary. I am unable to agree with this characterization. In light of the Commission's opinion there can be little question but that the Commission clearly concluded that the trust was legally irrevocable and so treated it.

the general rule of law succinctly stated in Restatement of the Law of Trusts § 339, arguments apparently accepted by the majority opinion, are in my opinion, unavailing. Those arguments, three in number, are briefly as follows:

1) In Delaware an exception exists as to commercial trusts designed to achieve a specific business purpose where third parties have an interest in its purpose. Although possibly this argument might apply were the law of Delaware controlling, the fact remains the situs of the Marine Midland Bank trust is New York.

2) The power of the Commission to redress illegal control situations "is practically plenary".

3) Missouri Pacific is not likely to eliminate or revoke the trust.

The inapplicability of (2) and (3) above is apparent. As pointed out throughout Judge Decker's Opinion the issue is one of control; whether or not Missouri Pacific's §5(4) violation was redressed. The issue is not whether Missouri Pacific would take advantage of a position gained by reason of its §5(4) violation or what the Commission could do in the face of Missouri Pacific's exercise of control.

I am further unable to agree with the majority of the court that this trust issue has little to do with the case or is of minor importance.

The nature of the trust, necessarily determined by its legal effect, is a paramount public interest issue and an evaluation of Missouri Pacific's §5(4) violation. It necessarily affects the control or absence of control Missouri Pacific had over its Eastern stock, and any determination of Missouri Pacific's good or bad faith.

In the same context I should like to observe that the Commission in similar but subsequent § 4(2) acquisition proceedings directed towards the Chicago South Shore and South Bend Railroad issued an Order (Finance Docket

Nos. 23141, 23566 and 23587) directing further investigation into a similar trust agreement.

I agree that the determination of this revocability issue is only part, (however I believe it to be a major part) of matters considered by the Commission in its determination of the overriding issue of control of Eastern stock by Missouri Pacific. From this I necessarily agree that the Commission could have arrived at the same determination of the case notwithstanding it having determined the trust to be revocable. The fact remains, however, that the Commission has not made such a determination. In effect the majority opinion now makes this determination for the Commission and I feel without legal authority.

Similarly related to Missouri Pacific violations of §5(4) were its later actions, subsequent to the creation of the aforementioned trust, wherein it further acquired additional stock in Eastern. For reasons not entirely apparent to the court the Commission arbitrarily and in an apparent abuse of its descretion refused to consider such evidence, evidence which in my opinion necessarily relates to the initial §5(4) violation and might well tend to show a further violation in flagrant disregard of the Commission and of the Act. Central of Georgia Ry. Co. Control, 307 ICC 39 (1958).

Although apparently reasonable and proper in the context of the limited facts before it and of its own erroneous legal conclusion, the question now arises whether the public interest is still preserved or whether a consideration of these additional related facts viewed in their proper legal setting might not lead the Commission now to conclude that this case falls within or more closely approximates its prior holding in the *Central of Georgia* case.

In dissenting I should like also to note that I am fully aware of the Commission's recent Order of June 23rd denying herein the St. Louis Southwestern Railway Company's petition for reopening, further hearing and reconsidera-

tion. It seems to indicate what I somewhat suspected. If the case were referred back to the Commission, as legally I believe it should be, the Commission would probably reach the same results with negligible concern to new facts or corrected legal constructions. Notwithstanding this seeming apparent uselessness of remand I am still of the belief that it would be better and more accurate legal procedure to return this case to the Commission and require it go on record as to the consequences of the additional facts and corrected legal conclusions herein expressed.

Were I to prevail in remanding this case to the Commission I would also direct the following further inquiry and necessary finding and conclusion adjustments.

The Commission's order of 1965 was based, and significantly depended upon, the pre-1962 depressed financial condition of Eastern. It is apparent on the basis of the pleadings and briefs now before the court that Eastern has benefited from major and significant advancements in its financial status since 1962. Many of these changes were activated and took place prior to the entry of the Commission's final order in 1965. By way of a petition to reopen the record, attempts were made to present this information to but were rejected by the Commission. Whether or not this information would have caused a change in the Commission's final order is again purely conjectural. However, the relevancy and significance of this information can not be questioned and I would have the Commission reopen the record to give it proper consideration.

In the course of considering 1962 to 1965 changes in Eastern's financial status, the Commission would be further enlightened by the more recent Eastern financial statements.

Further, I would direct the Commission to review and make findings as to the facts surrounding the Dempsey-Tegler and Eastman-Dillon convertible bond purchases,

specifically inquiring into the length of time the bonds were held and to whom they were sold.

Also, the Monon's evidence, heretofore ignored by the Commission, should be heard and a finding should be made as to what effect, if any, the Commission's present ruling will have on the Monon—L & N dispute. The intended scope and extent of the Commission's directive, if renewed, that the Missouri Pacific negotiate the sale of what has been referred to as the Evansville line to the L & N should be made more exacting and definitive. Necessarily, the effect of this directive on the Monon or on a subsequent §5(2) application should be spelled out. The briefs and arguments before the court demonstrate a complete and total uncertainty and disagreement among all parties as to this issue.

A remand would also serve to enable our most recent intervenor, the St. Louis Southwestern (Cotton Belt), properly to be heard.

ENTER:

CAMPBELL
Chief District Judge

DATED: August 4, 1966

APPENDIX 2

Report and Order of the Interstate Commerce Commission

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 21755[1]

MISSOURI PACIFIC RAILROAD COMPANY—CONTROL—CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

Decided February 16, 1965

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1. In Finance Docket No. 21755, acquisition by the Missouri Pacific Railroad Company, and through that carrier, by the Mississippi River Fuel Corporation, of control of the Chicago & Eastern Illinois Railroad Company and the latter's subsidiary and affiliated companies, by the ownership and purchase of capital stock and securities approved and authorized. Condition requiring inclusion in transaction of the Louisville & Nashville Railroad Company, and other conditions, prescribed. Jurisdiction retained to make such further order or orders as hereafter may be necessary or appropriate.

2. In Finance Docket No. 21892, applications of Illinois Central Railroad Company and through that company, of Illinois Central Industries, Inc., for authority to acquire control of Chicago & Eastern Illinois Railroad Company and the latter's subsidiary and affiliated companies through the ownership of capital stock denied.

3. In Finance Docket No. 21980, upon investigation, the control or management of Chicago & Eastern Illinois Rail-

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[1] This report also embraces Finance Docket No. 21892, Illinois Central Railroad Company—Control & Eastern Illinois Railroad Company, and Finance Docket No. 21980, Chicago & Eastern Illinois Railroad Company—Investigation of Control.

road Company in a common interest with Missouri Pacific Railroad Company found to have been effectuated in violation of section 5(4) of the Interstate Commerce Act, but to have been terminated upon the creation of an independent voting trust. Investigation discontinued.

4. Petitions of the Bureau of Inquiry and Compliance and the Illinois Central Railroad Company to reopen the proceeding for further hearing denied.

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REPORT OF THE COMMISSION

TUGGLE, *Commissioner:*

Exceptions to the report and recommended order of the hearing examiner were filed by the Illinois Central Railroad Company (Illinois Central), the Chicago & Eastern Illinois Railroad Company (Eastern), the Louisville and Nashville Railroad Company (Dixie Line), the Chicago and North Western Railway Company (North Western), the Wabash Railroad Company (Wabash), the Monon Railroad (Monon), the Mississippi River Fuel Corporation (Mississippi Fuel), the Bureau of Inquiry and Compliance, Interstate Commerce Commission (Bureau), and the Railway Labor Executives' Association (Labor). Replies were filed by the Illinois Central, Paul Kern, intervening security holders of the Eastern, the Dixie Line, Mississippi Fuel, and the Missouri Pacific Railroad Company (Missouri Pacific).[2] We have heard the parties in oral argument. Our conclusions herein differ in some respects from those of the hearing examiner.

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[2] Missouri Pacific, Eastern, Illinois, Central, Dixie Line, North Western, Wabash, and Monon are all common carriers by railroad subject to the provisions of part I of the Interstate Commerce Act. Mississippi Fuel is a corporation which is not a common carrier as defined in the act, and is not now subject to regulations under the act. Paul Kern and the intervening security holders of Eastern are persons not subject to regulation under the act.

By application in Finance Docket No. 21755, filed September 19, 1961, as amended November 14, 1961, and April 23, 1962, the Missouri Pacific seeks authority under section 5(2) of the Interstate Commerce Act to acquire control of Eastern and its subsidiary and affiliated companies, through the ownership of stock. In the same docket, Mississippi Fuel, which then owned more than 30 percent of the voting stock of the Missouri Pacific, filed a supplemental application on September 27, 1961, in the event it is found to be a necessary party to Missouri Pacific's application.

By application in Finance Docket No. 21892, filed December 26, 1961, and amended January 25, 1962, Illinois Central also seeks authority under section 5(2) to acquire control of Eastern and its subsidiary and affiliated companies through the contemplated purchase of capital stock or securities of Eastern.

Subsequently, on June 25, 1964, Illinois Central Industries, Inc. (Illinois Industries), a noncarrier holding company which controls Illinois Central through ownership of 93 percent of its capital stock, filed a supplemental application in Finance Docket No. 21892 to acquire indirect control of Eastern through its control of Illinois Central.

Dixie Line, as authorized by order dated February 8, 1962, withdrew its previously filed application in Finance Docket No. 21733 to acquire control of Eastern through stock ownership, and also withdrew its opposition to the applications filed by Missouri Pacific and Illinois Central in Finance Docket No. 21755 and Finance Docket No. 21892. Pursuant to section 5(2)(d) of the act, however, it has petitioned for inclusion in the transaction of the successful applicant in the event either of the applications is approved, and seeks conditions requiring such applicant to cause Eastern to sell certain portions of its line (or as an interim measure to grant trackage rights over those portions) and to bring about the approval of such sale (or trackage and service rights) by holders of the stock and other securities of Eastern.

By order dated March 2, 1962, in Finance Docket No. 21980, entered on our own motion, we instituted an investigation into the possibility that, in violation of section 5(4) of the act, Missouri Pacific and Dixie Line (and The Bank of New York as trustee and agent for the latter) may have acquired control of Eastern without our prior authorization under section 5,[3] through substantial purchases of Eastern's securities which each has made.

Numerous protests and petitions for leave to intervene were received. The application proceedings have been heard on a consolidated record in conjunction with the investigation proceeding. Appearances were entered by the North Western and the Monon in opposition to the applications and Dixie Line's petition. The St. Louis Southwestern Railway Company, the Chicago, Burlington & Quincy Railroad Company, the Missouri-Kansas-Texas Railroad Company, the Seaboard Air Line Railroad Company, the Southern Railway Company, and the Wabash appeared in opposition to the applications, but would be satisfied if adequate conditions to protect existing gateways, routes, and channels of trade are imposed. Stipulations for that purpose were filed in general terms covering all affected railroad interveners, and in special terms contained in separate agreements with the St. Louis Southwestern Railway Company and the Wabash. Appearances on behalf of the

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[3] Section 5(4) of the act provides that:

It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, the control or management in a common interest of any two or more carriers, however, such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue or maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words "control or management" shall be construed to include the power to exercise control or management.

public service or public utilities commissions and other agencies of Arkansas, Kansas, and Missouri, were made in support of the Missouri Pacific application, and on behalf of similar agencies of Alabama, Georgia, Indiana, Kentucky, and Tennessee in support of the Dixie Line petition. Other appearances were entered by affected counties, municipalities, civic and trade organizations, and numerous shippers and receivers of freight and by minority security holders of Eastern in support of, or in opposition to, the whole or portions of the applications and Dixie Line's petition. Labor appeared in opposition to the applications on behalf of railway employees. Briefs were filed and a report and recommended order of the hearing examiner were served.

The hearing examiner found (1) in Finance Docket No. 21755, that (*a*) control of Eastern and its subsidiary and affiliated carriers by Missouri Pacific, and indirectly by Mississippi Fuel through its ownership and control of Missouri Pacific, would be in the public interest, (*b*) Mississippi Fuel should be subjected to the applicable provisions of section 5(3) of the Interstate Commerce Act,[4] and (*c*) inclusion of

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[4] Section 5(3) of the Interstate Commerce Act provides that:

Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Section 20(1) to (10), inclusive, of this part, [part 1] * * * (which relate to reports, accounts, and so forth of carriers), and section 20a(2) to (11), inclusive, of this part, * * * (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of section 20a of this part * * * the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of such carrier to perform such service, and that it is otherwise consistent with the public interest.

Dixie Line in the transaction at this time would not be in the public interest; (2) in Finance Docket No. 21892, that acquisition by Illinois Central of control of Eastern and its subsidiaries and affiliates would not be in the public interest; and (3) in Finance Docket No. 21980, that neither Missouri Pacific nor Dixie Line, nor any person allied with them, individually or together acted to acquire control of Eastern in violation of section 5(4) of the act.

The hearing examiner also found that the control of Eastern by Missouri Pacific would result in practically no adverse effect upon employees of either railroad. He recommended, however, that in the event the combined operations, coordinations of facilities, and integration of train schedules and services should cause injury to the interests of carrier employees affected by the transaction, the same conditions as were prescribed in *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 317 I.C.C. 557 be applied herein. To insure that Eastern and Missouri Pacific honor and otherwise adequately preserve all routing practices, traffic policies, and service heretofore in effect over their individual local and joint-line routes, to the extent such routes and services continue to be required by the public, he would impose traffic conditions as follow:

1. Under control of Missouri Pacific, Eastern shall maintain and keep open all routes and channels of trade via existing junctions and gateways, unless and until otherwise authorized by the Commission.

2. The present neutrality of handling traffic inbound and outbound and in overhead service by Eastern shall be continued so as to permit equal opportunity for service to and from all lines reaching the rails of Eastern without discrimination in the arrangements of schedules or otherwise.

3. The present traffic and operating relationships existing between Eastern, on the one hand, and on the

other, all lines connecting with its tracks, shall be continued insofar as such matters are within the control of Missouri Pacific.

4. Eastern shall accept, handle, and deliver all cars inbound and outbound and in overhead service, loaded and empty, without discrimination in promptness or frequency of service as between cars destined to or received from competing carriers and irrespective of destination or route of movement.

5. Missouri Pacific shall not do anything to restrain or curtail the right of industries located on Eastern to route traffic over any or all existing routes and gateways.

6. Missouri Pacific and Eastern shall preserve and maintain the same schedules on the present freight and passenger trains, unless such schedules after revision, provide later departure times and/or earlier arrival times at junctions and gateways, in such a manner that the existing cutoff times for connecting trains of other railroads would not be changed, or would not cause or permit such connections to be delayed or broken.

7. All new through routes and newly established train service over the Missouri Pacific-Eastern combined lines shall be published open without restriction and without prejudice to participation by any railroad connecting with Eastern or Missouri Pacific, at the terminals and/or intermediate points served by the new trains.

8. Any party or any person having an interest in the subject matters may at any future time make application for such modification of the above-stated conditions, or any of them, as may be required in the public interest, and jurisdiction will be retained by the Commission to reopen the proceedings herein on its own motion for the same purpose.

Certain pertinent excerpts from the hearing examiner's report are contained in appendix A, attached hereto. The findings and conclusions therein set forth are adopted as our own and will not be restated except briefly for the purpose of clarity in the discussion of exceptions.

Exceptions to Hearing Examiner's Report

On exceptions, Illinois Central objects to the approval of the applications of Missouri Pacific and Mississippi Fuel, and together with North Western disagrees with the hearing examiner's conclusion that the acquisition by Missouri Pacific and Dixie Line of stock and securities of Eastern involved no violation of section 5(4) of the act, and with his recommendation that the complaint proceeding be dismissed. The Bureau also excepts to his conclusion and recommendation in this respect. North Western expresses concern as to the possibility for diversion of the traffic it now interchanges with Missouri Pacific and Eastern. Illinois Central contends, as does Monon, that we have no jurisdiction to consider Dixie Line's petition for inclusion in the approved transaction, and Eastern and Wabash except to the hearing examiner's imposing or failing to impose certain traffic conditions. Eastern also excepts to his failure to adopt conditions providing for the accumulation of interest on its securities. Mississippi Fuel excepts to being subjected to the reporting, accounting, and securities provisions of the act under section 5(3) thereof, and Dixie Line excepts to the denial of its petition for inclusion in the transaction. Labor contends that the employee conditions recommended by the examiner are inadequate.

DISCUSSION

Proposals of the applicants and the Dixie Line.—Detailed descriptions of the applications of Missouri Pacific and Illinois Central and the petition of Dixie Line are contained in appendix A. As shown therein, Eastern's railroad, ex-

tending from Chicago to Woodland Junction, thence along its western arm through Illinois to Joppa and Thebes, Ill., Chaffee, Mo., and (partially via trackage rights) to East St. Louis, Ill., and St. Louis, Mo., forms a natural extension of the lines of the Missouri Pacific from their present northeastern termini in the St. Louis and Thebes areas to Chicago. Likewise the eastern arm of Eastern's line from Woodland Junction to Mt. Vernon and Evansville, Ind., forms a natural extension of Dixie Line's route into the Chicago area.

In contrast to Eastern's end-to-end relationship to Missouri Pacific and Dixie Line, is its essentially side-by-side relationship to Illinois Central between Eastern's southern termini and Chicago. Rather than complementing Illinois Central's line as an extension thereto, Eastern is in direct competition with Illinois Central between St. Louis and Chicago and between Chicago and Ohio River points. Because of these contrasting relationships the effect of Missouri Pacific's proposal upon Eastern's operations would be significantly different from the effect of Illinois Central's proposal.

Both applications herein, as well as Dixie Line's petition, are supported by various State agencies, communities, shippers and other interested parties, all of whom show some basis for preferring one proposal over another. However, the evidence set forth in detail in appendix A is convincing that, as between control by Missouri Pacific and control by Illinois Central the former is more favorable to Eastern's development and utility as a part of the national transportation system.

With Missouri Pacific in control, credit would be made available to Eastern for improvements (under arrangements making the claims of the controlling carrier junior to Eastern's existing first mortgage bonds) and the operations of the two carriers would be coordinated to establish new through-routes, car and equipment pools, and

such joint use of facilities as would be feasible. Eastern would retain its identity as an independent carrier—operating its own departments, retaining its own officers and maintaining its own solicitation and sales forces. Thus its present operational structure would remain largely intact.

Although, as stated, such facilities as are susceptible of joint use by end-to-end railroads would be so used, there would be less opportunity for Eastern and Missouri Pacific to consolidate yards, facilities, and functions than exist for generally parallel railroads operating in direct competition with each other; and the minimal amount of duplicative trackage involved in an end-to-end transaction would, of course, result in less abandonment of line than would be the case where the affiliating carriers operate side-by-side.

A direct-line route into Chicago via the Eastern's lines would enable Missouri Pacific to increase its participation in transcontinental and southwestern traffic and thereby undoubtedly improve its earning power; and the expansion of Eastern's road-haul, switching, and terminal services necessary to accomodate the new traffic would, in themselves, increase Eastern's attractiveness to shippers.

On the other hand, as set out in appendix A, control by Illinois Central would result in the consolidation or elimination of portions, or in some cases all, of Eastern's administrative, executive and accounting facilities and the use jointly with Illinois Central of the corresponding facilities of that carrier. Where advantageous to the joint operation, yards, terminals, and portions of lines would be abandoned, new joint facilities constructed, and existing trackage rights operations modified, all in derrogation of Eastern's physical plant and employee force. Finally, as a direct competitor in much of the territory served by Eastern, Illinois Central would be in a position to favor routes involving its own lines as opposed to those involving Eastern and thus capture for itself much of the traffic now handled by Eastern.

In support of its proposals for the consolidation of its facilities and operations with Eastern's, and the elimination of Eastern as a competitor at common points, Illinois Central refers to *Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co.*, 317 I.C.C. 261, 279, 291, 296, and *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line*, 320 I.C.C. 122, 155-157, 163-165, 210-211. But neither decision supports Illinois Central's position, since the first concerns two essentially noncompetitive railroad systems resembling the Missouri Pacific-Eastern relationship, while the second involves, not the control of one railroad system by another, but the complete merger of two railroad systems into one, requiring the elimination of duplicative facilities and services as well as competition at certain common points if the objectives of the merger are to be realized.

Illinois Central contends on exceptions that it would be illogical to assume that it would spend up to $6 million to gain control of Eastern and then downgrade that carrier to the status of a local carrier adjunct of its own system. Nevertheless, we are convinced that, as pointed out in appendix A, under Illinois Central domination, Eastern would be so restricted in its conduct of its own operations that, in the event such domination were to be terminated, voluntarily or otherwise, the re-establishment of Eastern as an independently operated carrier would be, entirely impracticable, if not impossible.

Since Illinois Central and Eastern are today, by virtue of their geographic positions, one to the other, direct competitors, the success of the plan for bringing their interests under common control depends, not so much on improving and maximizing the use of Eastern's facilities and exploiting the advantages of its position, but rather, on shrinking its plant, consolidating certain functions, and eliminating the competition between them. The plan is not essentially oriented upon the expansion of industry and commerce

along Eastern's routes and the encouragement of a greater flow of traffic over Eastern, but rather upon the institution of economies through consolidation.

There would be little motive for Illinois Central to expend its energies in championing the cause of a competitor, in derogation of its own direct and permanent interests, even though that competitor would be within its control. For years as one of the nation's major railroads, Illinois Central has engaged in extensive and costly programs for the continuous modernization of its plant and improvement of its services; and it would not likely neglect or prejudice this investment for Eastern's benefit. As an adjunct of the Illinois Central system, Eastern would be merely an ancillary arm, a sometimes useful but not essential stepchild whose lines would be subject to atrophy from disuse and whose very life could eventually flicker out, if Illinois Central, after a time in control, decided to abandon the project.

An important motive behind the Illinois Central proposal is the desire to deny to both Missouri Pacific and Dixie Line an expedient access to the Chicago gateway. If successful, this design would fortify Illinois Central against increased competition from two strong, long-line rivals, as well as permit the elimination of competition from a short-line rival. There is no justification in the record for providing for such curtailment of competition. Approval of the Illinois Central plan would deny to shippers and receivers in the Southeast and in the Southwest a vastly improved direct-line service to and from the Chicago gateway for which this record contains abundant evidence of need.

The witnesses representing shippers which support Illinois Central gave testimony of the excellent service accorded them by that carrier, and, in general, were anxious to have such service continued. They expressed concern about a possible invasion of Illinois Central territory, about the ability of that carrier to withstand increased competi-

tion and diversion of its traffic, and about the possibility of reduced rates after Eastern comes under Illinois Central control. Illinois Central is a competent and strong railroad entirely capable of meeting whatever additional competition would follow the control plan we are approving herein, and of withstanding—without unsettling effect—the adjustments in traffic flow which could be triggered by Missouri Pacific's promotion of its proposed service improvements. In the circumstances here, it is our view that the sharpening of competition contemplated will foster for these shippers, benefits in service and possibly rates as well. No invasion of territory warranting protection will take place. Rather, the result will be a clearing of transportation channels to promote a freer movement of commerce between territories, which, we have no doubt, will work to the advantage of the shippers as well as the carriers. In view of these numerous considerations and those stated by the hearing examiner, we are denying the application of Illinois Central, in favor of the proposal approved elsewhere herein.

Missouri Pacific serves a broad territory south and west of St. Louis. Its lines radiate from St. Louis, across Missouri to Kansas City and St. Joseph, and on to Omaha, Nebr.; across Kansas to Pueblo, Colo.; across Arkansas, Oklahoma and Texas, serving such major commercial centers as Little Rock, Pine Bluff and Fort Smith, Ark., Dallas, Fort Worth, El Paso, and San Antonio, Texas; across Louisiana through Shreveport, Alexandria and Baton Rouge; along the Gulf of Mexico from Brownsville, Tex., to New Orleans, La., serving numerous ports including, among others, Corpus Christi, Galveston, Houston and Lake Charles; and serving a number of river ports including Natchez, Miss., Memphis, Tenn., and Cairo, Ill. Besides providing single-line service throughout this extensive territory, Missouri Pacific joins with other carriers in handling traffic on through routes to and from Mexico, the west coast of the United States and other areas east and west of

the Mississippi River, and participates in the movement of substantial export-import traffic to and from its Gulf ports.

Missouri Pacific's primary interest in seeking control of Eastern is to forge a direct line between that territory and the Chicago gateway, and make available to its shippers connections with other lines to which it does not now have ready access. Eastern would provide the vital tank. To achieve its objective Missouri Pacific would have to take such measures as necessary to revivify, and thereafter continuously nurture and exploit, rather than curtail, Eastern's facilities and operations. The success of the plan requires a flourishing Eastern active as a healthy partner in a joint endeavor.

The capacity to accomplish this is well within the means of Missouri Pacific. It has the physical means, the equipment, the financial resources, the experienced organization and the managerial skill. Though the joinder of Missouri Pacific's and Eastern's lines would be end-to-end, certain economies could be achieved through the consolidation of facilities at the common termini, which, in addition, would produce greater operating efficiency, minimize switching, reduce transit time, and in general improve service. Eastern would remain substantially intact, however, and the improvements anticipated would redound to its benefit and to the holders of its securities as well as to Missouri Pacific and the shipping public. By acquiring control of Eastern and causing improvements in its interchange facilities and arrangements therewith and within Eastern, Missouri Pacific would be able to provide its shippers with expeditious access to the extensive facilities and numerous rail, water and motor connections at the Chicago gateway, and thereby open to them additional markets and sources of supply.

Eastern's lines would be put into condition to handle high-speed trains, and separately scheduled trains would be

instituted to handle Eastern's local traffic, for the purpose of making additional fast-freight schedules available between Chicago and the Southwest. On trains to and from Chicago, substantial reductions in scheduled times as well as distance would be possible by routing via Thebes instead of St. Louis, for example, 12 hours on Los Angeles traffic, 14 hours on Dallas traffic and as much as 30 hours on New Orleans trains.

On traffic interchanged with Eastern in the St. Louis-East St. Louis area, Missouri Pacific could reduce terminal time up to 10 hours by effecting a direct interchange at its modern 23rd Street yard in St. Louis, thereby by-passing Eastern's Mitchell yard in East St. Louis and eliminating the need for handling by the terminal railroad and the use of its intermediate yard.

Benefits to shippers and carriers would come from the pooling of Eastern's freight car and motive equipment with that of Missouri Pacific and its subsidiaries for common use by all members of the proposed system. Over 1,000 locomotives and almost 70,000 freight cars would be made available, including, besides the ordinary cars, much specialized equipment such as Missouri Pacific's "damage-free" cars, auto parts cars, gondolas and hopper cars. This would afford some immediate relief to Eastern in that, without additional capital outlay at this time for needed equipment, it would have quick access on short notice to ordinary and specialized cars not otherwise available, and would be better able at a minimum cost to satisfy its shippers' needs, even those with special requirements, such as the automobile manufacturer at Chicago Heights and the grain trade. With the newer equipment available from the pool, Eastern's cost for car maintenance could be reduced, and by centralized coordination of the pool, coupled with more efficient scheduling of trains both to expedite transit time and minimize empty movement, car-hire costs, too, could be lessened.

Forthright support of the Missouri Pacific proposal to control Eastern has come from representatives of several States and numerous ports and localities in the areas served by both the railroads, and from representatives of the major industries in those areas. Unlike the witnesses supporting the Illinois Central proposal, who, in general, are seeking the maintenance of the status quo, these spokesmen hail the benefits foreseen in Missouri Pacific's plan, not only those accruing to Eastern by virtue of its alignment with a strong, complementary rail system, but also to the economic welfare of their own communities and to the shipping public by virtue of, among other things, the improved service, the encouragement of new industry, the access to wider markets, and the increase in competition both among rail systems and between them and other modes of carriage.

The advantages of the Missouri Pacific proposal which these public witnesses envision as flowing to themselves, their areas, and their commercial enterprises are more fully described in the examiner's report. We believe that they are realizable with no undue impairment of the opposing carriers, through the implementation of Missouri Pacific's plans, subject to the several conditions later discussed herein, and that, along with the other supporting evidence of record, they conclusively establish that control of Eastern by Missouri Pacific, as conditioned herein, would be consistent with the public interest; and we so find.

Diversion of Traffic.—The same factors that favor control of Eastern by Missouri Pacific rather than by Illinois Central insofar as Eastern's utility to the national transport system is concerned, apply also to Eastern's traffic. While Eastern under Missouri Pacific control would gain new traffic from the end-to-end affiliation, it would lose traffic under the control of the directly competitive Illinois Central. As to the effect upon other railroads, however, the beneficial aspects of the two applicants' proposals are not entirely on the side of Missouri Pacific.

Under Illinois Central's proposal, Eastern would be the only carrier subject to any appreciable traffic diversion. Connecting carriers would experience little, if any, change in traffic volume. However, the principal objection of both Illinois Central and North Western to control of Eastern by either Missouri Pacific or Dixie Line is the possibility that traffic now routed over their lines between Chicago and their respective connections with the Missouri Pacific and Dixie Line will be diverted to Eastern. Illinois Central states that it is not worried about the Missouri Pacific as a direct competitor to and from Chicago since, in its opinion, service offered by the Missouri Pacific-Eastern route would be no more attractive to shippers than that presently offered by other carriers serving Chicago. But it objects to the opportunity which it contends would be afforded Missouri Pacific to arbitrarily divert thousands of cars from their present routes to those of Eastern. It asserts that the only way control by Missouri Pacific can benefit Eastern is through the diversion of traffic from other carriers and that the other carriers in the Chicago area cannot develop sufficient additional traffic to replace that diverted by the Missouri Pacific.

The North Western points out that although in terms of mileage it is by far the largest carrier involved in these proceedings (its lines constituting about 5 percent of all class I railroad mileage), many of its lines are of low traffic density serving largely agricultural areas, while its industrial mileage is mainly concentrated in the eastern portion of its system in the region of Chicago. It considers Eastern a relatively minor factor in the national railroad system, with lines largely duplicative of other carriers. It contends that Eastern is not in the precarious financial condition described in appendix A, and that the providing of unneeded financial salvation to Eastern would, through the resulting diversion of interchange traffic to Eastern by Missouri Pacific, inflict such injury upon the North Western as to seriously affect its ability to continue serv-

ice to the communities and industries relying upon it for transportation.

The North Western appears most concerned about traffic it now interchanges with Missouri Pacific at St. Louis. Its contention is that Missouri Pacific, upon acquiring control of Eastern, would do everything in its power to channel traffic originating in the Southwest to its interchange with Eastern at Thebes, well clear of its interchange with North Western at St. Louis. Missouri Pacific, in its reply, counters that it cannot afford to permit the deterioration of its interchange at St. Louis, the most important interchange for its traffic to the west and southwest. We doubt there is any intention upon the part of Missouri Pacific to favor the relatively minor Thebes gateway over the important St. Louis gateway to the extent that its connection with other carriers would be disrupted at the latter point and its competitiors provided with an opportunity to capture the traffic upon which Missouri Pacific depends for continued profitable operation.

As detailed in appendix A, the applicants and North Western base their estimates of traffic diversion upon studies undertaken to support their respective points of view. The results of most of the studies are widely divergent or contradictory. For instance, North Western estimates an annual loss of traffic representing revenues of $4,815,156 if control of Eastern is acquired by Missouri Pacific, and revenues of $1,206,127 additional if Dixie Line's petition for inclusion is also granted; on the other hand, Missouri Pacific estimates $699,865 as the value of traffic which would be diverted from Illinois Central, and $532,694 for the traffic which would be diverted from North Western.

Most of the traffic related to these proceedings is routed by the shipper. In fact, Illinois Central's traffic witness testified that as much as 95 percent of total traffic is shipper-routed. Routings are usually influenced by a shipper's self-interest in response to a variety of com-

mercial and transportation factors. The most important of these is service-speed, transit privileges and facilities, care in handling, shipper convenience, etc.—but there are others, more or less imponderable and not readily ascertainable from any tabulation of car movements no matter how accurately compiled. Compare *Toledo P. & W. R. Co. Control,* 295 I.C.C. 523, 536-537.

The North Western's estimates are asserted to be the product of the best data processing system in use by railroads. This does not guarantee their accuracy, however; for the product is no more accurate or reliable than the factors upon which it is based, regardless of the efficiency of the computer system. The final segregation of cars which North Western contends would be diverted to Missouri Pacific was accomplished by applying arbitrary diversion factors to the car movements developed by the data processing system. It is as much a matter of partisan judgment as it is of mathematics. The diversion factors were applied without regard to the nature of ownership of equipment in which the studied shipments were transported, the railroad upon which the shippers or receivers were located, the complete route of movement, reconsignment or diversion in transit, the availabilities of facilities which govern stoppage in transit, or the use of transit privileges.

An illustration of the inflated character of these estimates can be seen in North Western's appraisal of the diversion possibilities in the St. Louis switching district. North Western claimed that on the basis of 1961 data, 5,203 cars of its traffic to and from that district were susceptible of diversion to Eastern. Yet the cars handled by Missouri Pacific for North Western numbered only 2,501. When confronted by the disparity, the North Western's witness admitted that his estimate included cars not controlled by Missouri Pacific.

Another example is the North Western's estimate of loss on forest products traffic from the Northwest to Chicago. Of 1,243 cars said to be divertible to Eastern, 1,175 were handled by Union Pacific and North Western with interchange at the Missouri River, and only 58 were received from Missouri Pacific. The susceptibility of the 1,175 cars was said to be due to increased solicitation pressures expected from Missouri Pacific. While Missouri Pacific will undoubtedly increase its participation in this traffic, it is far from likely that it can so completely thwart the combined solicitation efforts of Union Pacific and North Western.

Our observations as to North Western's estimates are not to be construed as a complete rejection thereof and as a whole-hearted acceptance of Missouri Pacific's estimates. Applicants in proceedings of this kind are as prone to minimize as protestants are to exaggerate the susceptibility of traffic to diversion. In our opinion, however, Missouri Pacific's estimate brings us closer to the fact.

If Missouri Pacific's proposed operation would substantially endanger or impair others in the performance of their common carrier functions, approval would probably not be warranted. See *Chicago, B. & Q. R. Co.—Control,* 271 I.C.C. 63, 157 and *Minneapolis, St. P. & S. S. M. R. Co. Acquisition,* 295 I.C.C. 787, 802. But we are not required to insulate protesting carriers from all the risks in the business of rail transportation in areas where strong rail competition exists. Compare *Erie R. Co. Merger,* 312 I.C.C. 185, 247. Nor must we determine with mathematical precision the traffic which will be diverted as a consequence of the control sought. Compare *Spokane International R. Co. Control,* 295 I.C.C. 425, 436. It is enough to find, as we do here, that no serious dislocation of traffic patterns of the protesting railroads will occur.

Accordingly, in view of the tendency of shippers to route their own traffic the testimony regarding the attractive

service being furnished by Illinois Central and North Western; the vulnerability of Missouri Pacific to a disastrous loss of business through retaliation if it were to permit any serious deterioration in its existing connections with other carriers through the favoring of connections with Eastern; and our belief that Missouri Pacific's estimates of traffic diversion more nearly reflect the losses that would be incurred by other carriers than do those of North Western, we conclude that the losses would not be so large as to warrant a denial of Missouri Pacific's application. We are also of the opinion that the benefits to be derived by Eastern as a subsidiary of Missouri Pacific and to the shipping and traveling public will outweigh any adverse effects therefrom to Illinois Central and North Western and that any such adverse effects will be minimized by the traffic conditions we are hereinafter imposing.

Inclusion of the Dixie Line.—A petition for inclusion was filed by Dixie Line under section 5(2)(d) which provides that:

> The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

The proposals of the Dixie Line with respect to its inclusion in whichever of the instant applications is approved are set forth in appendix A and need not be repeated here in detail. Briefly stated Dixie Line asks that we condition our order so as to require the successful applicant to cause Eastern to negotiate with Dixie Line for the acquisition by the latter of Eastern's line from Evansville to Woodland Junction, and joint ownership and use of Eastern's line thence to Chicago. The hearing examiner concluded

that with reasonable variations in Dixie Line's proposal, as developed at the hearing and on brief, the operation by Dixie Line over the Evansville line would be beneficial to Eastern's position and, along with Missouri Pacific's control of the remainder of Eastern's line would be consistent with the public interest.

The Illinois Central and the Monon object to the consideration of Dixie Line's petition. The former alleges error in the hearing examiner's denial of its motion to dismiss the Dixie Line petition, while the Monon contends that Dixie Line is not a "railroad in the territory involved" within the meaning of section 5(2)(d) of the act, and that consequently we lack jurisdiction to entertain the petition.

Illinois Central argues that, since we lack the power to directly compel Eastern to grant trackage rights to Dixie Line (*Baltimore & O. R. Co. Operation*, 261 I.C.C. 535, 544-545) or to sell a portion of its line, we may not indirectly accomplish the same purpose by including Dixie Line in these proceedings. The cases cited in support of the examiner's denial of the motion, it contends, are inapplicable to Dixie Line's situation inasmuch as they concern interveners petitioning for inclusion as part of a system to be controlled, rather than, as here, for authority to obtain a portion of the controlled railroad. It argues that the inclusion of Dixie Line prejudices its own case inasmuch as Dixie Line's position supports that of Missouri Pacific.

We are satisfied that Dixie Line is a "railroad in the territory involved." There is the connection between Eastern and Dixie Line at Evansville where thousands of cars are interchanged annually, and others at Mt. Vernon, Ill., Mr. Vernon, Ind., and St. Louis—all points served by both railroads. Missouri Pacific also serves Mr. Vernon, Ill., and St. Louis. In fact Dixie Line operates a line completely across the State of Illinois between Evansville and St. Louis. Dixie Line and Illinois Central are gen-

orally competitive south of the Ohio River and, through connection with Eastern, between the south and Chicago. The terms of section 5(2)(d) are sufficiently broad to permit consideration of the Dixie Line petitions as petitions for inclusion of a "railroad in the territory involved." Furthermore, the terms of section 5(2)(d) do not attempt to describe the conditions under which such "railroad in the territory involved" may petition for inclusion in a transaction. Neither do they define the transactions in which inclusion may be sought, nor limit inclusion to transactions of the same type or to instances where the inclusion will not prejudice the case of another participant. They refer merely to a "proposed transaction." No transaction within section 5(2) is excluded from the scope of paragraph (d) thereof and consequently we would have authority to entertain a petition for inclusion without regard to the nature of the inclusion or other specific relief sought therein.

Contrary to Illinois Central's contention, granting Dixie Line's petition would not be tantamount to a mandatory sale of Eastern's property or grant of trackage rights over its line. Dixie Line agrees, on exceptions and in reply to exceptions, that the condition which it requests calls for the successful applicant to cause Eastern to negotiate in good faith for the conveyance of the Evansville-Chicago line and that before the line could be acquired, Dixie Line would first have to obtain the approval of this Commission under a separate section 5(2) application. Details of the transaction including the price to be paid or other consideration would be matters for evaluation in such a proceeding. The conditions requested by Dixie Line would be mandatory only in the sense that good faith negotiations would be required. However, as Dixie Line observed in its reply to exceptions, they would not make it mandatory that the negotiations be successful and the acquisition be accomplished.

It is recognized that Dixie Line requires no authority from us merely to enter into negotiations; but without the conditions it requests, there would be no assurance that any offer it might make for the purchase or lease of the Evansville-Chicago line would even be considered by Eastern after that carrier comes under Missouri Pacific control. We would be derelict in our responsibility to serve the public interest, if, in the face of this record, we failed to provide Dixie Line an opportunity to acquire the Evansville line. With appropriate modification of Dixie Line's proposal, the operation of that line by Dixie Line would be consistent with the public interest. The examiner so found, Missouri Pacific so agreed, and the evidence adduced in the record by the parties confirms it.

In considering proposals advanced under section 5, we are required to predicate approval upon such measures as would "best promote the service in the interest of the public and the commerce of the people." To this end we are guided by the criteria set forth in *N. Y. Central Securities Co.* v. *U. S.*, 287 U.S. 12, wherein the Supreme Court stated, at page 25, that the term "public interest"—

> has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities.

In view of these transcendent public interest criteria, it is essential that a mechanism be set up for bringing together Eastern (under Missouri Pacific control) and Dixie Line for the purpose of considering terms for the inclusion of Dixie Line in this transaction; and this we shall do by prescribing compulsory negotiation; but beyond that, any further action by us as to the purchase or lease must await the adduction of facts upon an appropriate record yet to be made.

From its connection with Eastern at Evansville, Dixie Line extends east and south in a 13-State area, linking the

Chicago-Evansville line with such major commercial and industrial centers as Louisville, Ky., and Cincinnati, Ohio, to the east; Nashville, and Chattanooga, Tenn., and Atlanta, Ga., to the southeast; Huntsville, Guntersville, Gadsden, Birmingham and Montgomery, Ala., to the south; and reaching numerous port cities, such as St. Louis, Memphis, New Orleans, Biloxi, Mobile and Pensacola. In connection with Eastern, it provides the shortest routes between the Chicago gateway and many points in the southeast; and together those two carriers have, for many years, handled great volumes of North-South traffic. Through interchange with other lines at Chattohoochee, Fla., Birmingham, Montgomery, Atlanta, Chattanooga, and other points, it bridges Florida and the southeastern seaboard with the Chicago gateway via the Chicago-Evansville line. In addition, it joins Eastern and other lines in the continuance of rail passenger service between Chicago and points in the south and southeast spanning the region from New Orleans on the west to Florida points on the east. The map, reproduced below, illustrates the contours of Eastern in relation to Dixie Line and the territory thereby served (Official Guide of Railways of the U. S. 1965):

In petitioning for inclusion in the control transactions, Dixie Line proposes a plan for its acquisition of the Chicago-Evansville line with which, upon effecting substantial improvements thereon, it would establish a major, first-class, single-line rail route between Chicago and the Southeast. This it would accomplish by installing heavy-duty rail, rebuilding bridges on which Eastern has been unable to undertake repairs, and generally rehabilitating the physical plant, on which for a number of years Eastern has had to defer maintenance; by unifying terminal facilities at Evansville and consolidating certain administrative and managerial functions; by instituting local trains in order to speed up through trains; by eliminating congestion and delay now encountered in interchange; by employing its large, modern and varied supply of rolling stock; and by

MINNESOTA
WISCONSIN
MICHIGAN
IOWA
INDIANA
OHIO
ILLINOIS
KANSAS
KENTUCKY
VIRGINIA
W. VIR.
PENN
N.Y.
ARKANSAS
OKLAHOMA
TENNESSEE
NORTH CAROLINA
SOUTH CAROLINA
MISSISSIPPI
ALABAMA
GEORGIA
FLORIDA
LOUISIANA
TEXAS
MEXICO
MINNEAPOLIS
ST. PAUL
DES MOINES
OMAHA
ST. LOUIS
KANSAS CITY
CHICAGO
DETROIT
CLEVELAND
PITTSBURGH
COLUMBUS
INDIANAPOLIS
CINCINNATI
LOUISVILLE
NASHVILLE
ATLANTA
DALLAS
HOUSTON
NEW ORLEANS
MEMPHIS
BIRMINGHAM
MONTGOMERY
JACKSON
C&EI

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bringing to bear upon the entire single-line operation an efficient program for operating repair shops and terminals, for handling cars and trains, for maintenance operations, for administrative functions and for customer service.

At Evansville, where trains interchanged between Dixie Line and Eastern are required to use an interchange track through the middle of the city, a by-pass track is proposed which would permit avoidance of the city. Yard operations would be performed at Dixie Line's Howell Yard southwest of the city and a part of Eastern's Wanford Yard just north of the city could be eliminated. These improvements would minimize congestion at Evansville and reduce by about 2½ hours the time for clearing cars past the city.

A number of bridges would be replaced. Some of these, constructed in the last century, were not designed for the fast, heavy-loading trains of modern times and they lack the high clearances needed to accommodate certain of today's specialized equipment such as trailers on flat cars. This penalizes shippers concerned with commerce to and from the Southeast. Eastern has provided emergency repairs from time to time, keeping the bridges under close surveillance, and has imposed on some a speed limit of 20 miles per hour. These temporary measures do not facilitate expeditious and dependable service. Under Dixie Line's program the necessary reconstruction would be undertaken forthwith after which piggy-back service would be expanded and high-speed schedules resumed.

Among the objectives of the Dixie Line proposal is the recapture of traffic lost in recent years as a consequence of service deficiencies stemming from Eastern's financial problems—such things as increasing shortages in ordinary and specialized freight cars, disruption of schedules, discontinuance of through trains, stopping fast trains to perform local service, delayed interchange. It appears on this record that operation of the Chicago-Evansville

line by Dixie Line would eliminate or substantially lessen such disabilities, reduce damage from excessive yard handling, facilitate the tracing of shipments, expand shipper access to transit privileges, make direct facilities available for handling rate adjustment problems and bring about significant improvements in service generally.

For the first time the fast-developing Atlanta area would have single-line rail service to and from Chicago, as would be the case as well for Nashville, Chattanooga and other important commercial and industrial centers in five States of the Southeast. Other points, which already have a single-line connection to Chicago, such as New Orleans, Memphis, Mobile and Birmingham, served by Illinois Central or Gulf, Mobile & Ohio, would be afforded the benefit of an additional, competitive, single-line connection. "The single-line haul makes available a wider source of supply for transit shippers in the service area, reduces time consuming and costly interchanges, and provides greater flexibility in rate-making—all to the benefit of the public generally." *Chicago & N.W. Ry. Co. Purchase, Minneapolis & St. L. Ry. Co.*, 312 I.C.C. 285, 294 (1960).

Dixie Line has provided its shippers with service to and from Chicago through joint line arrangements over Eastern's Evansville segment. Under its single-line proposal, it would retain the desirable present schedules and supplement them to speed-up transit time. For example, some northbound trains with a Chicago arrival time of 5:00 a.m. would remain unchanged, permitting present connections to be met; while others would be rescheduled to reduce the elapsed time as much as 10 hours and 45 minutes from Nashville, Atlanta, Birmingham and New Orleans. Southbound trains now leaving Chicago at 9:45 p.m. would be given an additional hour and 15 minutes prior to departure but the scheduled time for reaching destinations in the Southeast would not change. Trains now leaving Chicago at 7:00 a.m. would be rescheduled to depart at

9:30 a.m. and to arrive at destination much earlier—for example, on trains to Atlanta and New Orleans arrivals would be more than 16 hours earlier than present schedules; to Birmingham and Nashville more than 15 hours would be pared off.

On the proposed fast freights time is included for stops to pick up or leave cars at Danville and Terre Haute, but local freight operations, now performed by Eastern's trains handling through freight, would be turned over to strictly local trains operating daily instead of tri-weekly as at present. The through passenger trains conducted jointly by Dixie Line and Eastern would maintain their schedules.

These passenger trains, serving between Chicago and numerous points in the South and Southeast, including, among others, Nashville, Atlanta, Birmingham and Montgomery, with New Orleans, Miami and St. Petersburg, Fla. connections, have been operated, as is the case with most rail passenger trains, at a substantial loss; and in 1960, Eastern's passenger deficit arising from the Evansville line came to $1.7 million. By taking over the freight service on that line, improving it and increasing the revenues therefrom, it seems probable that Dixie Line could better recoup some of the losses incurred in passenger operations without any significant curtailment of passenger service.

We have abstracted from the record as described above how shippers' interest and the interest of the public in general would be served by the annexation of the Chicago-Evansville line to Dixie Line. Part of the reason such benefits can be forecast is that the Chicago-Evansville line, routed in the Chicago commercial complex, forms the stem from which a number of Dixie Line's major routes branch out to the Southeast, such that there is a certain interdependence between the two lines. Unlike Missouri Pacific which, regardless of what might happen to or on the Evansville line, can still project its system into Chicago and can best serve its Southwestern territory via Eastern's

lines to St. Louis and Thebes, Dixie Line is so situated that the condition of the Evansville line and the character of the operations thereon are matters of vital concern to it and the shipping and traveling public of several States. As a result of the annexation it seeks, Dixie Line could guarantee for itself, and that public, the upgrading of Eastern's Evansville line to the high standards of the rest of its system.

The evidence clearly reflects the ability of Dixie Line to implement its proposal. It is a large, financially sound and well managed railroad with a record of over a century of successful operations. It has more than 700 locomotives and over 60,000 rail cars including a variety of specialized equipment available for use on an enlarged system. The freight car fleet is the largest in the South. Its financial condition would permit the expansion on reasonable terms without undue strain.

There is wide support for the Dixie Line proposal from shippers, public agencies and civic organizations. The Governors of Alabama, Indiana, Kentucky and Tennessee and representatives of Georgia expressed the belief that the proposed single-line service would be an asset to their States by improving transportation, spurring industrial growth, aiding local railroad workers, all of which would be beneficially reflected in the general welfare. The mayors of Evansville, Terre Haute, Vincennes and Watseka and representatives of commercial interests in these and other cities along the Evansville line and Dixie Line's routes consider that the Dixie Line plan would promote the welfare of their areas.

Numerous shippers representative of farming, mining, manufacturing and other industries appeared in support, not only because of their concern for the preservation of service on the Evansville line, but also because of their need for faster, more flexible and dependable transportation and favorable rates. Some, which had diverted traffic from

rail because of the recent deterioration in Eastern's plant and service, want high quality rail service restored. For instance, a manufacturer of drugs, chemicals and animal feeds with a plant at Terre Haute provides Eastern with long hauls on commodities having nationwide distribution; and because of Eastern's reduction of switching services over a two-year period, it diverted to motor carriers 14.5 percent of its traffic in one year and 24 percent the next year. In another instance, a Florida citrus-marketing cooperative diverted Chicago bound traffic from Dixie Line because of the deterioration in Eastern's service; it anticipates that with the expansion of piggy-back and Dixie Line's operation of the Evansville line, a substantial part of the perishable fruits traffic could be returned to the rails.

While the testimony of these supporting witnesses demonstrates a public concern for the preservation, improvement and expansion of rail service on routes in which Dixie Line participates, a concern which, no doubt, could be allayed and satisfied by the institution of Dixie Line's proposal; another concern of some gravity is in evidence and demands like attention, namely that of the opposing railroads apprehensive of their own traffic in the face of the prospective intensification of competition.

It should be noted initially that during the past decade the 5-State area of the southeast served by Dixie Line and its connections—Alabama, Florida, Georgia, Kentucky and Tennessee—has experienced a higher rate of population and industrial growth than other sections of our country. In the context of transportation, this growth means the generation of new traffic (particularly in the commodities grouped as manufactures and miscellaneous), and a demand for additional and improved transport facilities and services. On the strength of service improvements flowing from its operation of the Chicago-Evansville line, the record at bar indicates Dixie Line could vie for a larger share of this

increasing traffic. Its participation in manufactures and miscellaneous traffic during the five years preceding 1961, as in the case of railroads generally, declined; yet, during the same period, motor carrier participation in this much sought traffic substantially increased. To the extent Dixie Line might attract a portion of the new traffic being generated by the area's growth or recapture traffic previously diverted to other modes of carriage, the success of its operation would have no deleterious effect upon other railroads, but, instead, would contribute to their well being, at least as to Dixie Line's rail connections and particularly those serving territories west and north of Chicago.

In those instances where Dixie Line would be in direct competition with other railroads and, by effectuating its plan, would enhance its competitive position, a number of countervailing factors would come into play to prevent a serious or abrupt dislocation of the present competitive balance. For example, to and from Chicago, Illinois Central's Memphis and New Orleans routes are 147 and 170 miles shorter and in some instances take 8 and 22 hours less time; to Birmingham, Illinois Central provides service 7 hours faster; and in joint line service connecting Chicago with Atlanta and Jacksonville, Illinois Central's time would not differ substantially from that contemplated in Dixie Line's plan.

On joint-line routes to and from Chicago via the Cincinnati and Louisville gateways—where modern, electronic classification yards are in operation—there are service advantages which would preclude the diversion of traffic to the Evansville line. In addition, Dixie Line would be subject to routing instructions of shippers, retaliatory action by other railroads upon which it depends for important interchange traffic and to the traffic conditions we would impose to keep open the existing gateways and channels of commerce. Because of these and other restric-

tive influences upon its conduct, we do not believe Dixie Line could, by its operations of the Chicago-Evansville line, so prevail over the railroads opposing its plan as to impair or significantly affect their ability to compete or maintain the standard of service to which shippers have become accustomed.

We are not unmindful that in *Seaboard Air Line Railroad Co.—Merger—Atlantic Coast Line Railroad Co.*, 320 I.C.C. 122 (1963) we authorized the merger into Seaboard of Coast Line, which possesses control through stock ownership of Dixie Line. In that proceeding, it was contended by Illinois Central and others that the merged company would so favor Dixie Line over other connections that any approval of such merger should be conditioned upon the merged company divesting itself of control of Dixie Line. We declined to require such divestiture, partly because we found that Illinois Central's ability to retaliate would deter the merged company from unduly favoring Dixie Line (320 I.C.C. at 175-177, 188-190). With those findings in mind, it is our conclusion in the instant case, for the reasons set forth above, that to permit Dixie Line to operate directly into Chicago over the Evansville segment would not impair the retaliatory power of Illinois Central and other lines to deter a merged Seaboard-Coast Line from unduly favoring Dixie Line.

Even if it could be presumed that, under Missouri Pacific control of Eastern, the Chicago-Evansville line would be maintained and the shippers dependent thereon served, the fact remains that the line is isolated from what would be the main Missouri Pacific routes to Chicago. Except as to Danville and points north thereof, the Evansville segment does not logically fit into Missouri Pacific's proposed system; to move traffic from and to that segment via St. Louis or Thebes would involve a circuitous and undesirable route of movement.

For Dixie Line, the Evansville segment could be the main route to Chicago, a direct route between Chicago and five southeastern States of which only one is served by Missouri Pacific and that at a single point in its western extremity. Missouri Pacific, in its reply to exceptions, concedes that, if proper arrangements can be worked out, it would be in the public interest for Dixie Line to have the Chicago-Evansville line and that the evidence submitted by Dixie Line supports such a conclusion. It indicates a belief that in the end such arrangements can be worked out to the mutual benefit of Dixie Line, Eastern, and Missouri Pacific.

Yet Missouri Pacific objects to the conditions requested by Dixie Line, on the grounds that (1) it (the Missouri Pacific) would be required thereby to reach terms with Dixie Line before control of Eastern could be consummated; (2) Dixie Line's original proposal for the acquisition of rail lines and appurtenances to which Missouri Pacific has no objection has been expanded to include, as well, non-carrier investment property and an interest in a subsidiary holding industrial development property; (3) under proposed conditions Nos. 3 and 5 (see appendix A) the purchase agreement is to be negotiated between Dixie Line and the successful applicant but the price is to be established at a later date by Dixie Line and Eastern; and (4) under proposed condition No. 6 (see appendix A), Dixie Line would use its stock holdings in Eastern as leverage to obtain its ends in negotiations for the Chicago-Evansville line.

Missouri Pacific contends that the proposed conditions are so vague as to be incapable of conversion into workable terms; this because they do not specify what properties of Eastern are to be turned over to Dixie Line, nor make provision for the liens of mortgages on such properties; nor explain how Missouri Pacific can cause the sale to Dixie Line of the Chicago-Evansville line if it may not exercise control of Eastern until it comes to terms with

Dixie Line; and because even if Dixie Line and Missouri Pacific can arrive at an agreement, there is no assurance that the necessary consents of Eastern's Board of Directors, stockholders and bondholders can be obtained. A further contention is that the conditions were designed to enable Dixie Line to get a line of railroad at a bargain price.

The hearing examiner recommended that any sale of the Eastern's property be "held in abeyance for a period of time necessary to experience the effect of actual operation of the Eastern's line under Missouri Pacific control." The latter carrier agrees with the hearing examiner in this respect. Dixie Line, to the contrary, argues that it is the only party with a natural and long-standing interest in the Chicago-Evansville line and the incentive and means to build it into a profitable line through the stimulation of a large volume of traffic by providing through, single-line service between Chicago and the Southeast and that any delay in its operation of the line will only react to the detriment of the shipping public. It maintains that its proposed conditions would not prevent Missouri Pacific from assuming control of Eastern. And it objects to any proposal for non-exclusive trackage rights over which it would be afforded the Chicago-Evansville line, arguing that since the line suffered a net loss of $2.7 million in 1960, two railroads could not operate profitably over the line.

Missouri Pacific's objections could be met, we believe, by revising the conditions sought by Dixie Line to provide, and we do hereby so require, that Missouri Pacific, if it assumes control of Eastern, shall immediately thereupon (1) take all reasonable, necessary and appropriate steps to cause Eastern to negotiate in good faith for the sale to Dixie Line, of so much of Eastern's line of railroad, including branches, appurtenances and facilities as is set out in appendix C hereto, so that Dixie Line would be enabled to provide service between Evansville and Chicago, including intermediate points and points on branch lines spring-

ing from Eastern's mainline between Evansville and Chicago, the negotiations to begin as soon as feasible and to be completed not later than one year after the effective date of our order herein; and (2) take such steps as are necessary to permit Dixie Line to provide service between Evansville and Chicago, including intermediate points and points on branch lines, under trackage or joint use rights temporarily, pending final determination of Dixie Line's acquisition proceeding.

Dixie Line is to submit for consideration of this Commission, by an appropriate application under section 5(2) of the Act, any agreement reached in the negotiations; but, if the parties are unable to arrive at mutually acceptable terms within the period set for the negotiations, that fact shall be brought to the Commission's attention with the filing of the said application; and, in either event, the Commission, pursuant to the Act, shall determine equitable, just and reasonable terms consistent with the public interest, upon which Dixie Line may accomplish the acquisition of the Eastern properties set out in appendix C. We shall retain jurisdiction to reopen these proceedings upon our own motion for the purpose of insuring that negotiations are conducted in good faith by the parties.

As shown in appendix A, Eastern's corporate charter provides that so long as any of its class A (preferred) stock remains outstanding, the favorable vote of two-thirds of the owners thereof as a class is required to authorize the sale of the Eastern's properties. The charter also provides that the class A stock may be called for redemption by payment in cash of $40 per share, plus accumulated and unpaid dividends. Accordingly, Missouri Pacific is to take such steps as will assure the necessary stockholders' assents to any agreement reached for the sale of the Chicago-Evansville line or the acquisition of trackage rights thereover. Our order will provide for the notification to all parties to these proceedings by the Missouri Pacific of the

date of its consummation of control of Eastern and such consummation shall constitute acquiescence in and irrevocable assent to the foregoing condition.

Traffic conditions.—Wabash excepts to the failure of the hearing examiner to impose two traffic conditions to which Missouri Pacific agreed at the hearing. Though it does not except to the traffic conditions which the examiner did recommend, Wabash asserts that they do not protect it in the same manner and to the same extent as would the conditions it wants us to include. The two additional conditions would provide that:

> Missouri Pacific shall use its best efforts to continue its through routes with railroad connections via St. Louis, Mo., in full vigor as fast competitive service routes for the movement of freight between points on or beyond said St. Louis-East St. Louis connections and points on or beyond Missouri Pacific, maintaining at least the same standard of service as prevailed on the date Missouri Pacific acquires control of Eastern.
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> In the event Missouri Pacific improves its service between Thebes, Ill., and points south and west of Thebes on traffic to be handled over Eastern from Thebes north to, from or via Eastern interchange points between Thebes and Chicago, then the same Missouri Pacific service improvement south and west of Thebes shall be afforded to traffic to, from or via the St. Louis-East St. Louis gateway.

We are not bound to impose the conditions requested by the Wabash even though agreed to by the Missouri Pacific unless we find them to be required by the public interest. Since the Missouri Pacific has agreed on the record to protect the routes and interchanges of the Wabash as requested by that carrier, in our opinion, the imposition of the agreed upon protection as a condition to our authoriza-

tion would serve no useful purpose and is not required by the public interest. They need not be imposed herein.

Eastern agrees that its control by Missouri Pacific would be consistent with the public interest to the extent that shippers and railway labor are concerned. It contends, however, that insufficient consideration has been given to its security holders. The conditions recommended by the hearing examiner are challenged as being inadequate, and certain of the traffic conditions are said to be so unduly onerous, that if complied with, they would most likely deny Eastern's security holders control of their property and deprive them of a return on their investment. The two traffic conditions recommended by the hearing examiner to which Eastern takes exceptions are conditions Nos. 6 and 7 as follows:

> 6. Missouri Pacific and Eastern shall preserve and maintain the same schedules on the present freight and passenger trains, unless such schedules after revision, provide later departure times and/or earlier arrival times at junctions and gateways, in such a manner that the existing cutoff times for connecting trains of other railroads would not be changed, or would not cause or permit such connections to be delayed or broken.
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> 7. All new through routes and newly established train service over the Missouri Pacific-Eastern combined lines shall be published open without restriction and without prejudice to participation by any railroad connecting with Eastern or Missouri Pacific, at the terminals and/or intermediate points served by the new trains.

With respect to condition No. 6, Eastern explains that it and Missouri Pacific do not operate any joint through or connecting passenger trains, and Dixie Line, with which such trains are operated, does not request any such condi-

tion. It contends that the condition would make resort to this Commission mandatory for any discontinuance or change in train service that it can presently accomplish at its option through either this Commission or the regulatory agencies of the States involved, upon a showing of public convenience and necessity therefor.

It asks that the reference to passenger train service contained in this condition be deleted from our order.

Eastern's objections to recommended condition No. 7 are that it is a new condition not heretofore imposed in stock control cases and that it would be disastrous to Eastern's revenues. The record shows that Missouri Pacific would stop through trains operating between Thebes and Chicago at intermediate junctions such as Danville, Momence, and Watseka so as to connect with major eastern railroads in order to bypass the Chicago terminal. Eastern argues that once the through trains serve one of the intermediate terminals for one purpose, condition No. 7 would apply to all traffic interchanged at those points and the consequent short-haul received by Eastern would provide insufficient revenues to cover terminal costs on such traffic. This, it argues, could result in the loss of net revenue in excess of what its control by Missouri Pacific might provide, and that the condition in its entirety should be deleted from our order.

While we are not entirely convinced that either of the challenged traffic conditions would be as detrimental to Eastern as represented, we believe the other carriers will be adequately protected by the so-called standard conditions for the protection of existing routes and channels of trade.

These standard conditions, as imposed in *Detroit, T.&I.R. Co. Control,* 275 I.C.C. 455, 492-493, and revised in *Toledo, P. & W. R. Co. Control, supra,* 541-542, are essentially the same as those recommended by the hearing examiner except for the substitution of standard condition No. 6 for the con-

dition of that number he recommended and the deletion of his recommended condition No. 7. They have been prescribed in numerous cases in the past. Their meaning is generally agreed upon and they have been accepted as fair and equitable in most instances by the railroad industry. They will provide just and reasonable limitations upon the ability of Missouri Pacific and Eastern to favor selected routes and gateways or to vary the degree of cooperation with the interveners in regard to schedules, interchanges of freight, or other arrangements. The public interest will best be served by their imposition here, as set forth in appendix B hereto.

Other Conditions Requested by the Eastern.—Eastern also excepts to the hearings examiner's failure to adopt the following conditions said to be for the protection of security holders and retired employees:

1. Supplement General Mortgage Indentures to make interest unearned in any year accumulate up to a maximum of 20 percent, which shall be a charge upon and be paid from any subsequent year's income available for contingent charges before any income shall be available for or paid as interest on income debentures or as dividends on any stock now or hereafter outstanding, or secure the consent of any appropriate percentage of ownership of bonds to the continuation of interest as a contingent charge, any General Mortgage bonds being held by the applicant not to be counted as being outstanding or eligible to vote on the issue.

2. Supplement Income Debenture Indenture to make interest unearned in any year to accumulate up to a maximum of 15 percent, which shall be a charge upon and be paid from any subsequent year's income available for contingent charges before any income shall be available for or paid as dividends on any stock now or hereafter outstanding, or secure the proper

percentage approval of Debenture holders to permit the Indenture to be unchanged.

3. For a period of ninety days after the effective date of the order approving the control, the successful applicant be required, at holder's option, to purchase, for cash, or to exchange securities of the applicant's own issues, having a market value equivalent to the cash price of Eastern securities tendered, at the following prices:

   (a) General Mortgage Income Bonds—$663.50 per $1,000 principal amount.

   (b) 5 Percent Income Debentures—$351.00 per $1,000 principal amount.

   (c) Class A Stock—$25.75 per share.

   (d) No. par common stock—$13.00 per share.

4. Continue in accordance with the terms and amounts, the supplementary retirement benefits as to all persons who have retired prior to the effective date of the compliance with all conditions precedent to the exercise of control.

5. Supplement General Mortgage Indenture, Income Debenture, By-Laws and Certificate of Incorporation, to provide that the General Mortgage bondholders and the Income Debenture holders, each group voting as a class, may each, as a class, elect one member of the board of directors of Eastern, provided that if the number of directors shall be increased then each group of security holders shall be entitled to elect two directors if the total membership is 25 or less and to elect one additional director or each additional five directors.

Eastern contends that the foregoing conditions providing for the accumulation of interest on contingent interest

securities, which would have to be made up before dividends could be declared are for the purpose of discouraging the Missouri Pacific from controlling the operations of Eastern in such a way as to assure that no revenue would be available for contingent interest in one year so that in the next year Eastern's earnings could cover not only contingent interest but a good dividend on common stock. It also contends that the condition for the continuance of the supplementary retirement benefits to all persons who have retired prior to the effective date of the exercise of control is needed because the program is voluntary and is consistent with the principles underlying protective conditions for existing employees. It asserts that the condition with respect to representation of security holders on the board of directors of Eastern is consistent with many reorganization plans and is a minimal necessary protective provision.

In opposition to the conditions requested by Eastern were representations by minority holders of Eastern's stock and securities who contend that the conditions would adversely affect Eastern's financial condition and are actually designed to maintain the present management in control by making the proposed acquisition of control unacceptable to Missouri Pacific. Since Eastern would provide the sought-for direct access to Chicago, causing or allowing further deterioration of its financial condition would not be consistent with Missouri Pacific's purpose. In fact one of the chief factors advanced by Missouri Pacific in support of its application is its ability, willingness and purpose to strengthen Eastern's financial condition. If we anticipated that control by Missouri Pacific would result in the manipulation of revenues about which Eastern expresses concern, we would be justified in withholding approval of Missouri Pacific's application. Such action on our part would not be warranted on the present record, however, and we agree with the hearing examiner that Eastern's request for the foregoing financial conditions

is not material to the questions under consideration. The conditions require no further review in these proceedings.

Employees conditions.—Labor filed no exceptions on the merits of Missouri Pacific's proposal. It does object, however, to the conditions for the protection of railway labor recommended by the hearing examiner, taking the position that these so-called *Southern* conditions do not afford adequate protection to employees affected by section 5(2) transactions and are violative of the spirit of section 5(2)(f) of the act which requires a fair and equitable arrangement to protect the interest of railroad employees so affected. Labor's contentions here are similar, if not identical to those presented and disposed of in previous cases where the *Southern* conditions have been imposed. See *Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co., supra,* and *Detroit, T. & I. R. Co.—Control—Ann Arbor R. Co.*, 317 I.C.C. 619.

At oral argument, Labor urged that if one of the applications is approved, we should impose the *New Orleans*[6] conditions with a modification of the fringe benefits provision. Its contention was that since the fringe benefits protection under the provision now generally used, lasts only so long as such benefits are accorded employees on the home road, the controlling railroad has the power to curtail the fringe benefits of the affected employees merely by causing a curtailment of such benefits on the home road. Labor, in addition, requests specific provisions dealing with the compensation for vacation rights of dismissed employees.

In the *Southern-Central* case, *supra,* we adopted an arbitration clause which makes available for submission to binding arbitration of disputes not settled by agreement between the carrier and the employee. Except for this modification, we regard the *Southern-Central* conditions

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[6] Reference is to the conditions prescribed in *New Orleans Union Passenger Terminal Case,* 282 I.C.C. 271.

as conforming substantially to the *New Orleans* conditions. See *Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co.*, 317 I.C.C. 261, 288; *Southern Ry. Co.—Control—Central of Georgia Ry. Co., supra,* and *Seaboard Air Line Railroad Company—Merger—Atlantic Coast Line Railroad,* 320 I.C.C. 122. As we pointed out in a number of prior cases, the *New Orleans* conditions are a combination of the *Oklahoma* conditions and the provisions of the Washington Agreement.[7] In the *Seaboard-Coast Line Merger* case, at page 203 we found that the "*Oklahoma* conditions alone . . . would be completely sufficient to make equitable provisions for all fringe benefits for affected employees." Nowhere in the *Southern-Central* conditions or in the reports themselves is there any language which would deprive an affected employee of the fringe benefit attached to his previous employment. The fringe benefit clause of the *Southern-Central* conditions provides fringe benefits for affected employees "under the same conditions and so long as such benefits continue to be accorded to other employees on his home road . . .". This provision is substantially the same as the one incorporated into the *New Orleans* conditions as Section 6 of the *Oklahoma* conditions and Section 8 of the Washington Agreement. Since the terms sought by Labor, namely the *New Orleans* conditions, including the provisions of the Washington Agreement, have been substantially incorporated into the *Southern-Central* conditions, we shall impose herein the same conditions that were described in *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 317 I.C.C. 557, as supplemented and clarified in 317 I.C.C. 729 and 320 I.C.C. 377, including, among others, sections 4, 5 and 9 of the Washington Agreement (which formed the basis of the litigation before the U. S. Supreme Court in *Railway Labor Executives* v. *U. S.*, 379 U.S. 199, decided

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[7] Reference is to the Agreement of May, 1936, executed by 21 employee organizations and more than 100 railroads, including Eastern and Missouri-Pacific.

December 7, 1964). We are conscious of the Court's mandate in that case that we state the reasons for inclusion or exclusion of Sections 4, 5 and 9 of the Washington Agreement in or from our prescribed labor protective conditions. Here, however, where Missouri Pacific has agreed to accept the *New Orleans* conditions (which embrace Sections 4, 5 and 9 of the Washington Agreement) it would seem only necesary for us to note that those provisions have remained current since 1936 as the result of collective bargaining between railroad labor and management.

As to fringe benefits, it should be noted that they are regularly the subject of collective bargaining and are not likely to be altered summarily by unilateral action of the carriers. The dismissed or displaced employee, under the protections contemplated in the *Southern-Central* fringe benfits provision, is entitled to the same fringe benefits which would have accrued to him had he been retained in the employ of his home road. There is no reason why the adversely affected employee should be guaranteed better fringe benefits than would have been his had he not been dismissed or displaced as a result of the section 5 transaction approved. Vacation rights or privileges are within the category of fringe benefits and within the meaning of section 5(2)(f) are to be protected as such. When such benefits are lost or diminished as a result of the approved transaction, their compensability and all other questions relating to the protection thereof may appropriately be determined by agreement between the employees and carriers involved and, if need be, by the arbitration procedures herein provided.

Any dispute as to whether an inconsistency exists in the available protective provisions and as to an employee's rights therefrom arising shall be resolved through the procedures set out in the arbitration provisions hereby made available. In our opinion these conditions will provide adequate protection for railway employees af-

fected by the transaction, and our authorization herein will be made subject thereto.

Application of Mississippi Fuel.—Both Illinois Central and North Western except to the hearing examiner's approval of the supplemental application of Mississippi Fuel. The former contends that since the main interest of Mississippi Fuel lies in the transportation of natural gas by pipeline to the St. Louis area, a conflict of interest clearly underlies Mississippi Fuel's control of Eastern which derives most of its traffic from coal, a commodity in sharp competition with natural gas for the fuel market. Accordingly, North Western argues, the record lacks the necessary foundation to grant approval of Mississippi Fuel's application in the absence of evidence concerning this conflict of interest. The North Western cites various proceedings before this and other regulatory agencies, and the courts, in support of its contention that Eastern should not be controlled by a corporation engaged in a competitive line of endeavor; namely *Chesapeake & O. Ry. Co. Purchase,* 271 I.C.C. 5, 24; *Florida East Coast Ry. Co. Reorganization,* 267 I.C.C. 295, 334-335, 346-347; 282 I.C.C. 81, 120-122; *American Trucking Assns.* v. *United States,* 364 U.S. 1, 7-8; *Illinois Central R. Co.—Control—John I. Hay Co.,* 317 I.C.C. 39; *American President Lines, Ltd., Petition,* 7 C.A.B. 799; *National Air Freight Forwarding Corp.* v. *C.A.B.,* 197 F. 2d 384; *Continental Southern Lines* v. *C.A.B.,* 197 F. 2d 397; and *Philadelphia Co.* v. *Securities & Exchange Commission,* 177 F. 2d 720.

Mississippi Fuel is a necessary party to these proceedings by virtue of its stock interest in Missouri Pacific and only through such interest is its participation herein required. Its application is joined with that of Missouri Pacific as a supplement and was heard simultaneously therewith. The applications are interdependent to the extent that, if Missouri Pacific's were found to be contrary to the public interest and denied, there would be no grounds for grant-

ing that of Mississippi Fuel. Likewise, if because of conflict of interest or some other reason, the application of Mississippi Fuel was contrary to the public interest, then its participation in the management of Missouri Pacific would necessarily require the denial of that carrier's application.

As far as the financial condition of Mississippi Fuel is concerned, appendix A shows that as of December 31, 1961, it had assets of over $144 million, including over $72 million in properties after deducting depreciation, $36 million in other investments, and nearly $11 million in cash. Its current liabilities totaled $14.5 million. Accordingly, it appears well able to afford the acquisition of indirect control of Eastern.

One of the principal markets for the natural gas sold by Mississippi Fuel is the St. Louis area. Most of the coal handled by Eastern is shipped south to Joppa, Ill., or north to the Chicago area, in which neither Mississippi Fuel not its subsidiaries operate. Eastern does not now transport coal into the St. Louis area in any substantial amount because of the circuitous route involved. In fact, for that reason it did not handle any coal from the Illinois coal fields to St. Louis during the entire years 1959, 1960, and 1961. North Western alleges that Eastern could establish routes into St. Louis with the Missouri Pacific that would result in a conflict of interest with Mississippi Fuel. Any such routes, however, would meet the direct competition of railroads and other modes of transportation now handling coal into the area and would have little or no tendency toward lessening competition for the fuel market in that area. Moreover, since coal hauled by the Eastern does not, and apparently cannot, compete with gas sold by Mississippi Fuel—because of the disadvantageous location of the mines served by Eastern in relation to the St. Louis market and Eastern's routes thereto—it is hardly likely

that, under Missouri Pacific control, Eastern's situation could be worsened in this regard.

We have considered the proceedings cited by North Western in support of its contentions. They involve situations with respect to control by public utility holding companies of other businesses, the lessening of competition between railroads or between different modes of transportation, or control of carriers by a major shipper. None of the authorities cited are applicable to the situation presented here. In our opinion there is no basis in the record for denying Mississippi Fuel's application on the ground of conflict of interest. Accordingly, there is no basis for the denial of Missouri Pacific's application because of any disability of its corporate parent; and in finding that the control of Eastern by Missouri Pacific will be in the public interest, we must find that the indirect control of Eastern by Mississippi Fuel resulting therefrom will likewise be in the public interest, and we do so find.

Although agreeing that its application to acquire indirect control of Eastern should be approved, Mississippi Fuel objects to being considered a carrier subject to such of the provisions of section 5(3) as are applicable to any carrier involved in the control of another carrier or two or more carriers. It contends that its principal business activity is wholly unrelated to transportation subject to the Interstate Commerce Act, that it employs the major portion of its assets in such other business activity, and that it derives therefrom substantially all of its revenues. Therefore, it asserts, it should be made subject only to the requirement of making the usual annual report to the Commission required of carriers by railroad, and such special reports as may be required pursuant to section 20(1) and (2) of the act.

In addition to its interest in Missouri Pacific and carriers subsidiary thereto, Mississippi Fuel will acquire an indirect interest in Eastern and its subsidiaries. It is also currently

involved in a proceeding in Finance Docket No. 22274, *Texas & Pacific Railway Co.—Control—Kansas, Oklahoma & Gulf Railway Co. et al.*, decided June 22, 1964, in which The Texas & Pacific Railway Company, a Missouri Pacific subsidiary, was authorized to acquire control of the Kansas, Oklahoma & Gulf Railway Company, the Midland Valley Railroad Company, and the Oklahoma City-Ada-Atoka Railway Company. Accordingly, it would appear that Mississippi Fuel's interest in transportation subject to our regulation is substantial. However, it does not appear that any practical purpose would be accomplished by our subjecting it to the full regulation of section 5(3) of the act.

As the operator of a natural gas pipeline, Mississippi Fuel is subject to the regulation of the Federal Power Commission with respect to rates, territory served, construction of facilities, accounting, and reporting. Subjecting it to regulation as a common carrier under the Interstate Commerce Act would require it to duplicate its accounting and bookkeeping functions and to maintain accounts and books not required for its principal business. Its security issues are regulated by the Securities and Exchange Commission, and by the Federal Power Commission to the extent that proposed financing is an essential factor for consideration by that Commission in determining the public interest for new construction or enlargement of existing facilities. Subjecting its securities issues to our regulation could disrupt the established pattern of such issues and lead to jurisdictional conflicts. In our opinion it is neither necessary nor advisable to subject it to regulation as a common carrier, particularly in view of the fact that its common carrier subsidiaries, for the regulation of which we are primarily responsible, will remain within our jurisdiction, whatever action we take in regard to Mississippi Fuel. Accordingly, our order will subject Mississippi Fuel to the provisions of section 5(3) of the act only to the extent of requiring it to make such periodic and special reports as we may hereafter require pursuant to section 20(1) and (2)

of the act. We shall, however, retain jurisdiction to reopen the proceedings, upon our own motion, for the purpose of considering the further regulation of Mississippi Fuel under section 5(3) of the act, should such action become necessary in the future to protect the public interest.

Investigation of stock acquisition.—An account of the purchases of Eastern's stock and securities is detailed in appendix A. Admittedly Missouri Pacific and Dixie Line made their purchases, severally, as the first step toward obtaining control of Eastern. It was not a contubernal activity. At the time the hearings ended Missouri Pacific was the beneficial owner of about 31.4 percent of Eastern's outstanding class A stock and about 17.2 percent of its common stock, and this, when considered with its Eastern bonds capable of conversion into voting stock, would aggregate about 25 percent of the potential voting power outstanding. Inherent in Missouri Pacific's holdings at that time was the power to elect by cumulative voting 4 of Eastern's 13 directors.

At the same time, Dixie Line was the beneficiary under a trust which held, in common and class A stock and convertible bonds, about 28 percent of the potential voting power outstanding in Eastern, through which the trustee—the Bank of New York—could have elected 4 or 5 of the directors.

During the period between May 1955 and May 1961 the highest percentages of class A and common stock voted at Eastern's stockholder meetings were 89.6 and 86, respectively, and the average percentages of the shares voted were 80.3 and 84.4, respectively.

The purchase which gave rise to Missouri Pacific's control application was finalized on August 11, 1961, and the securities were held by Missouri Pacific directly, in its own name, for about 8 months until April 20, 1962, when they were conveyed to the Marine Midland Trust Company of New York as trustee.

The hearing examiner found that these purchases of Eastern's securities by and on behalf of Missouri Pacific and Dixie Line and the several transactions relating to them do not constitute the acquisition of control of Eastern in violation of section 5(4) of the act; and to this finding the Bureau, Illinois Central and North Western except.

Whether the conduct involved herein is violative of section 5(4) depends upon whether control of Eastern has been acquired by Missouri Pacific or Dixie Line or both; and this, in turn, depends upon the pertinent facts. The mere purchase or ownership by one carrier of a particular portion of another's voting stock or convertible bonds is not a violation, nor is the creation of a voting trust; for neither of these, in itself, is defined by statute, or held by decision, to be unlawful, and neither alone is indicative or probative of the proscribed control. What is essential to a violation, as explained in *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, 169 (1957), is a significant increase in the power of one carrier over another as manifested, for example, in an increased voice in management or operation, or the ability to accomplish financial transactions or operational changes with greater legal ease. The influence of the one carrier over the other may also be evident from the ability of the one to encumber the other in accomplishing, or to prevent the accomplishment of, financial transactions or operational changes, as for example, through the possession of certain veto powers. See Finance Docket No. 21510, *Norfolk & Western Ry. Co. and New York, Chicago & St. L. R.R. Co.—Merger, etc.*, decided June 24, 1964, in which it was found that one carrier's holdings of rights and powers in another, similar to those growing out of the class A stock herein, was inconsistent with the complete divorcement of that carrier from all managerial and fiancial interests in the other.

In the case of the Missouri Pacific, it clearly possessed, by virtue of its direct holdings of Eastern's class A stock

during the 8 months preceding the creation of the trust in April 1962, the power to prevent a two-thirds majority of such stock from being voted at any stockholder meeting—assuming, of course, that the amount of stock voted would follow the pattern set in the 6-year test period cited above; and as a result, it would have been able to block stockholder assent to, and thereby prevent Eastern from accomplishing, various corporate transactions such as mergers, leases and sales. The charter provision which accords this power to the class A stock is characterized by Missouri Pacific as a "standard protective provision afforded owners of minority stock interests" through which such interests might have an effective voice in matters pertaining to the intrinsic investment value of their stocks, such as, mergers, consolidations and plans for the alteration or modification of the stock. Commission decisions are cited in which rights growing out of protective provisions were found not to constitute control.

The provisions here in question require the consent of two-thirds of Eastern's outstanding class A stock for (1) charter amendments which would affect the character and value of the class A stock, (2) the sale or other disposition of all, or substantially all, of Eastern's properties, and (3) consolidations, mergers, leases or sales which do not result in liquidation. While these matters undoubtedly relate to the intrinsic value of the securities, so that the rights of the class A stock relating thereto may correctly be described as protective; it is equally clear that the rights and power of the class A stock with regard to the transactions in (3) above, particularly leases and sales, are an infringement upon the freedom of management in its operations, and to that extent they constitute elements of control and not merely stockholder protection.

Though Missouri Pacific did not exercise this power and, from all that appears in this record, did not, in attempt or in fact, influence Eastern's management, it nevertheless

was in violation of section 5(4) during that 8-month period; for, by statutory definition, "power to exercise control"—whether or not employed—is included within the meaning of the proscribed "control or management." Consequently, we must find that Missouri Pacific was in violation of section 5(4) of the act during the time it directly held the Eastern securities.

Though we recognized that, during those 8 months, Eastern's Board of Directors was authorized under the certificate of incorporation to redeem the class A stock or replace it with debentures of their company, we cannot agree with Missouri Pacific that the redemption and conversion provisions completely nullify the veto power inherent in the class A stock it held; for, as a practical matter, Eastern could ill afford to expend cash for its own outstanding stock, and the procedures for effecting an exchange of stock for debentures and the need for resorting to them, are themselves an encumbrance upon the freedom of management.

On the basis of all the Eastern securities it held, Missouri Pacific might have been able to place as many as four men on Eastern's 13-man Board of Directors prior to April 20, 1962. But Missouri Pacific did not vote any of its stock and has not had any person affiliated with it placed on Eastern's Board. In fact, when Eastern's management rejected a suggestion that 2 men be nominated by Missouri Pacific, the matter was dropped and not further pursued. The record makes it abundantly evident that, except for the limited veto power it possessed through its holdings of the class A stock, Missouri Pacific did not otherwise have power to control Eastern, and that it did not exert any apparent influence on Eastern's management, prior to or after the creation of the voting trust.

The next inquiry goes to the nature and extent of the relationship between Missouri Pacific and Eastern since the trust became effective. Pursuant to the trust agree-

ment all of Missouri Pacific's holdings in Eastern were transferred to the trustee, subject to terms under which the trustee is entitled to vote all of the Eastern securities deposited in the trust to the end that Eastern shall be properly managed. This voting entitlement is conditioned in that it is to be exercised in such a way as to maintain Eastern's complete managerial independence of Missouri Pacific, and vice versa; that it is not to be exercised in any way as to cause any dependence or intercorporate relationship between the two companies; and that it is not to be exercised at all in matters relating to the acquisition of control of Eastern except as may be authorized by this Commission or required by a court. The trust, during its term, is irrevocable, and is to remain effective until the occurrence of events specified therein, but none other. The stated events are (1) a sale of all the deposited securities (sales may be made only to persons not affiliated with Missouri Pacific), (2) the delivery to the trustee of an order of this Commission authorizing Missouri Pacific to acquire control of Eastern or to purchase any of its properties, or authorizing the release of the securities for any reason, or (3) passage of 10 years (ending April 20, 1972).

The trust agreement was drafted in terms obviously designed to meet the requirements for independent voting trusts heretofore approved and/or prescribed by the Commission in a number of proceedings involving the question of one carrier's control of another where the object of the trust was to bar the beneficial owner of the securities from participation in the control, management and operation of the issuing carrier. See *Interstate Commerce Commission* v. *Baltimore & O. R. Co.*, 183 I.C.C. 165, *Wabash R. Co. Control,* 247 I.C.C. 365 and *New York, C. & St. L. R. Co. Control,* 295 I.C.C. 703. A specified duty of the trustee is to insure by its exercise of the voting rights that, to the extent the power inherent in those rights can be brought to bear, the barrier between Missouri Pacific and the management of Eastern—erection of which is the object of the

trust—shall remain inviolate. There is neither serious allegation nor evidence that this contractual obligation has not been successfully accomplished.

By its terms, the trust was adequate to divest Missouri Pacific of any power it might possess to control or manage the affairs of Eastern in a common interest with its own through the ownership of the Eastern securities originally deposited with, or later acquired by, the trustee. To hold it inadequate would require a finding that the inadequacy lies, not in the terms of the trust agreement, nor in its execution, but in the failure to obtain this Commission's imprimatur prior to its effectuation; and there is no requirement in the law for such a finding.

The carrier creating a trust without our prior approval proceeds, of course, on the mere chance that, if put to the test of judicial scrutiny, the trust will be upheld as having prevented the acquisition of control or as having caused a termination of control, as the case may be. To insure the avoidance of unlawfulness; to avert the possibility of having a particular trust arrangement, though entered into in good faith, stigmatized as an unlawful device for circumventing the requirements of section 5; and to dispense with the need for a burdensome investigation by the Commission—carriers would be well advised to seek the Commission's prior approval of the trust, so that, having the provisions appraised and approved in the context of the particular case, the carrier might proceed with the assurance that its conduct is indeed lawful.

That Missouri Pacific failed to submit the trust agreement for our prior approval does not reflect to its credit, but neither does it detract from the success of the trust arrangement in effecting the divestiture sought. We find, therefore, that from and after the time the trust arrangement was put into effect, Missouri Pacific has had neither control nor power to control the affairs of Eastern.

As to Dixie Line, the circumstances compel a finding that it has not acquired control of, or power to control, Eastern. Dixie Line entered into a trust agreement with The Bank of New York as trustee on September 7, 1961, prior to acquiring the Eastern securities, and, thereafter, all the purchase of securities were made by the trustee so that, at no time, did legal title thereto reside in Dixie Line. The provisions of the trust agreement are, in substance, the same as those in the Missouri Pacific trust discussed above, and, if faithfully executed, they would effectively insulate Dixie Line (as beneficiary under the trust) from any power to control Eastern.

The respective trustees chosen, Marine Midland Trust Company of New York by Missouri Pacific, and The Bank of New York by Dixie Line, are each reputable, competent, experienced, and fully qualified trust companies, having no relationship or affiliation with its settlor except that shown by the respective trust indentures. Both are among the 50 largest banking institutions in the United States and have long been recognized as outstanding in their field—The Bank of New York having been chartered in 1791. There is not a scintilla of evidence of record to suggest that each was not completely independent of its settlor and could not act independently and impartially, free from any participation, suggestion, or control of either Missouri Pacific or Dixie Line, their respective affiliates and subsidiaries, or any other person whomsoever. We so find.

The contention has been made that by voting independently of each other or together, the trustees of Missouri Pacific and Dixie Line could effectively veto a merger or consolidation plan formulated by Eastern and that the existence of this power constitutes unlawful control. By advertising to the facts of this case we find the contention unfounded. Each trustee is completely free to vote its stock as it sees fit except as specified in the trust agreement. As previously found herein none of the restrictions

in the trust agreements are such as would create between trustee and settlor an affiliation within the meaning of section 5(6).

CONCLUSIONS AND FINDINGS

The circumstances herein duly warrant the findings that Missouri Pacific, and through it, Mississippi Fuel, did violate section 5(4) of the act in acquiring, without prior authorization under section 5(2), the power to control Eastern between August 11, 1961 and April 20, 1962, during which time Missouri Pacific, through its direct holdings of class A stock, possessed the power to prevent the accomplishment by Eastern of certain corporate transactions which might arise in Eastern's day to day business; that the violation ceased upon the effectuation of the trust hereinabove described; and that there was at no time any attempt to exercise the power so acquired. Also warranted are findings that the trustees named by Missouri Pacific and Dixie Line were and are qualified to undertake the fiduciary positions involved and have faithfully carried out the terms of their respective trust agreements in such a way as to successfully insulate Missouri Pacific and Dixie Line, individually and together, from the power to control Eastern, and that neither Missouri Pacific nor Dixie Line have acquired control of Eastern through the trusts or otherwise, except for the instance already noted.

These findings render moot the issues raised in the petitions filed by Illinois Central and the Bureau wherein further hearing is sought for the purpose of establishing that, by its trustee's acquisition of additional of Eastern's stock and convertible bonds subsequent to the hearing, Missouri Pacific and persons associated with it have acquired the power to control Eastern.

Even though we find a statutory violation through the unlawful acquisition of control, we are not free to summarily deny Missouri Pacific's application. For, in carry-

ing out the duty imposed upon us by law, we must necessarily make an appraisal of the whole case, and thereupon determine that disposition which would best serve the public interest. A violation of section 5(4) does not automatically defeat a transaction. If overriding public interest considerations are plainly evident, they are not to be rejected merely for the sake of returning the wrongdoer to the status quo ante; but should be recognized as justifying approval of the transaction. In our opinion, the public interest considerations in these proceedings overwhelmingly favor approval of Missouri Pacific's control of Eastern subject to conditions for inclusion of Dixie Line, notwithstanding the section 5(4) violation.

At the outset, it should be observed that, unlike the flagrant disregard for the law which characterized the situation in *Central of Georgia Ry. Co. Control,* 307 I.C.C. 39, there are in the present record a number of factors mitigating the unlawful conduct. The several restraining measures self-imposed by Missouri Pacific and Dixie Line in their efforts to avoid the violation, where successful to the extent that none of the acquired power to control the affairs of Eastern was actually, or could be, exercised by them. For example, when, after the Hammack interests were acquired by Missouri Pacific and the Hammack directors chose to serve out the balance of their terms, Missouri Pacific acquiesced and Eastern's management remained intact and independent. In the case of Dixie Line, the holdings were conveyed directly to the trustee, which from the beginning was accorded complete freedom in exercising the voting power. The autonomy of Eastern and its management does not appear to have been compromised, despite the fact that a power to control Eastern temporarily reposed in Missouri Pacific.

Of paramount importance in these deliberations is the impact our decision will have upon the public interest. A denial of the applications herein, on whatever ground,

would leave Eastern independent, as a relatively small, financially weak, and physically deficient railroad lacking the reserve and source of ready assistance needed to successfully compete with the relatively large, well-equipped, vigorous, long-line railroads operating in the same territory, and with the increasingly dynamic carriers of the other modes of transportation.

The need, in present day railroading, for high-speed and heavy-duty facilities, for expeditious and direct long-line transport, for specialized equipment and tailor-made service, and for the other qualities demanded by a shipping public engaged in the keen competition which marks our national economy, makes it essential that Eastern have access to revitalizing resources outside of itself, if it is to survive as a positive and contributing element of the national transportation system. To deny Eastern the relief and assistance offered through the several proposals now before us, would leave it foundering and of diminishing value to either the public generally or to its own security holders. Twice since the turn of the century Eastern has had to be rescued from bankruptcy by a reorganization—in 1922 and again in 1941; and now, in these proceedings we have the opportunity to approve remedial proposals capable of preventing a recurrence, at least in the foreseeable future.

Eastern's preservation as a prosperous competitive rail carrier under the control of Missouri Pacific and its corporate parent, Mississippi Fuel, is clearly in the public interest—certainly far more so than would be its eventual subjugation and disintegration under the control of Illinois Central and Illinois Industries, or its continued operation as a self-restricted, financially weak system as at present. Its operation by Dixie Line on the eastern branch and Missouri Pacific on the west as herein described would make available to a large number of shippers in the growing areas of the Southwest and Southeast a new single-line

rail service to and from Chicago which many have not had before; and, as previously explained, other carriers in the territory will not be affected to the extent that denial of the Missouri Pacific's application would be warranted on that ground.

It is our intention, in extending the conditional approval set out herein, that Missouri Pacific shall, within the time hereinafter prescribed, gain and exert sufficient control over Eastern through ownership of Eastern's securities to enable it fully to carry out the conditions prescribed herein; and, unless that amount of control is attained, Missouri Pacific will not qualify for the authorization given herein and will be required to divest itself forthwith of all its Eastern holdings. In the event the issuance of stock or securities is required in connection with the transaction, authority for such issuance must first be obtained under the provisions of section 20a of the act.

Inasmuch as we are approving their applications, we are not requiring of Missouri Pacific and Mississippi Fuel the divestiture of their Eastern stock and securities though acquired unlawfully, provided that the control of Eastern which we herein authorize is consummated within the 120 day period which we provide therefor in our order. That order will render the Marine Midland trust revokable and permit Missouri Pacific to take legal title to the Eastern securities now held therein. Consequently, in the event Missouri Pacific does not assume control of Eastern within the 120 day period, it and its corporate parent, Mississippi Fuel, are to immediately dispose of their holdings in Eastern's stocks and securities and notify this Commission promptly when this has been done, disclosing in detail the manner in which disposal of the stock and securities has been accomplished.

Exceptions and arguments not specifically discussed herein have been considered and found to be without merit.

We find that (1) in Finance Docket No. 21755, subject to the conditions for the protection of railway employees, the maintenance of existing routes and channels of trade, the inclusion of the Louisville and Nashville Railroad Company and other conditions referred to herein, the acquisition by the Missouri Pacific Railroad Company, and, through that carrier, by the Mississippi River Fuel Corporation, of control of the Chicago & Eastern Illinois Railroad Company and the latter's subsidiary and affiliated companies by the ownership and purchase of capital stock and convertible bonds, is a transaction within the scope of section 5(2) of the Interstate Commerce Act; that the terms and conditions proposed are just and reasonable; and that the transaction will be consistent with the public interest; (2) in Finance Docket No. 21892, the applications of the Illinois Central Railroad Company and the Illinois Central Industries, Inc., for authority to acquire control of the Chicago & Eastern Illinois Railroad Company and the latter's subsidiary and affiliated companies through the ownership of capital stock, is not shown to be in the public interest; and (3) in Finance Docket No. 21980, upon investigation, (a) the control or management of the Chicago & Eastern Illinois Railroad Company in a common interest with the Missouri Pacific Railroad Company was effectuated through the unauthorized purchase and holding of capital stock and securities, in violation of section 5(4) of the act, jointly and severally by the Missouri Pacific Railroad Company and the Mississippi River Fuel Corporation during the period August 11, 1961, and April 20, 1962; (b) the transfer of legal title to the unlawfully acquired stock and securities of the Chicago & Eastern Illinois Railroad Company to The Marine Midland Trust Company of New York as trustee effectively divested the Missouri Pacific Railroad Company and the Mississippi River Fuel Corporation of the power to control or manage the Chicago & Eastern Illinois Railroad Company and thereby terminated the violation; and (c) the holding of legal title to stock and

securities of the Chicago & Eastern Illinois Railroad Company by The Marine Midland Trust Company of New York and The Bank of New York as trustees, respectively, for the Missouri Pacific Railroad Company and the Louisville and Nashville Railroad Company in accordance with the provisions of the trust agreements approved herein for each, effectively insulated the Missouri Pacific Railroad Company and Mississippi River Fuel Corporation, and the Louisville and Nashville Railroad Company from the control or power to control the Chicago & Eastern Illinois Railroad Company.

An appropriate order will be entered.

VICE CHAIRMAN BUSH, dissenting in part:

Except for the determination with respect to the employee protective conditions, I agree with the findings of fact and conclusions of the majority made herein. I would impose those labor conditions prescribed in *New Orleans Union Passenger Terminal Case,* 282 I.C.C. 271, with the addition of the Railway Labor Executives' Association (RLEA) proposal that no affected employee, as a result of consummation of this transaction, shall be deprived of fringe benefits to which he may have been entitled prior to our approval hereof and a provision for compensation for displaced or dismissed rail employees for loss of vacation rights. I consider this just, reasonable and equitable for all.

It should be noted that RLEA and Missouri Pacific Railroad Company have already agreed to the New Orleans conditions. Thus, if all parties agree to the New Orleans conditions and the two additional provisions proposed by RLEA the entire issue of labor conditions will then have been arrived at by the highly desirable method of agreement by the parties.

COMMISSIONER HUTCHINSON, whom COMMISSIONER BROWN joins, dissenting in part:

I agree with the majority report except that I would not, at this time, impose employee protective conditions.

At oral argument the Association requested imposition of the conditions prescribed in the *New Orleans* case, 282 I.C.C. 271, with certain additional fringe benefits. The Missouri Pacific stated that it has no objection to the *New Orleans* conditions and indicated that it would study the fringe benefits requested by the Association.

If the Association's proposal is acceptable to the Missouri Pacific it would constitute an agreement specifically authorized by section 5(2)(f). The majority's imposition of conditions in the face of the apparent accord of the parties is premature and discourages agreements contemplated by section 5(2)(f).

In the circumstances, imposition of the employee protective conditions should be withheld for a period of 30 days from the effective date of the order to afford the parties a reasonable opportunity to arrive at a firm understanding respecting the details of the employee conditions. Pending final action, I would reserve jurisdiction under section 5(2)(f) and provide that no employee should be adversely affected in his present employment by reason of consummation of the transaction.

COMMISSIONER TUCKER, dissenting:

The C&EI has become an exceedingly reluctant bride in these proceedings. It now contends that the circumstances of 1960, upon which the majority bases its decision, have changed so radically as to make our record in these cases obsolete. I agree.

A totally new picture of significant growth of the C&EI has emerged since the hearings closed and, viewed together with substantial changes in Missouri Pacific's financial in-

volvement in the C&EI, this picture warrants further hearing by this Commission before a final decision is made.

The management of C&EI—which, after all, is the *only* carrier whose independence is at stake in these proceedings—does not feel that a delay of the decision to this extent would adversely affect that railroad. I agree, and I think that the public interest would best be served by our close scrutiny of the new facts.

The main thrust of the Missouri Pacific and L&N proposals approved by the majority is the revitalization of a crumbling short-haul terminal and bridge railroad operating vital gateways to Chicago. Since the hearings, however, the operating and financial position of the C&EI has improved very substantially, both because of a sustained general business growth in the nation and because of several favorable management, state, and regulatory actions. Counsel for C&EI pointed out at oral argument that in 1964 C&EI substantially increased its coal traffic over its 1963 totals under newly reduced competitive volume rates. Tax litigation in Illinois and new tax laws in Indiana have cut the carrier's property tax accounts almost in half in the past two years. Its monthly average piggyback business in 1964 increased 50 percent over 1963: Its December, 1964 TOFC traffic was up 61.6 percent over December, 1963. The C&EI in mid-January 1965 was enjoying its second highest cash position in the last 15 years. The market values of its Class A stock and its common stock have nearly doubled since late 1961. Its general income bonds, which were quoted at 570 in November, 1961, are now selling at over 900. There is absolutely no illustrated need for emergency surgery on the C&EI at this time.

There is, however, a definite need to clarify the record as to Missouri Pacific's extensive new purchases of C&EI securities and to determine whether that applicant, since the hearing, has willfully or otherwise ignored the teach-

ings of the recent leading case on unlawful control, *Central of Georgia Ry. Co., Control,* 307 I.C.C. 39.

The Illinois Central and this Commission's Bureau of Inquiry and Compliance have recently alleged that, in effect, since the hearing in 1962 the Missouri Pacific, together with two "friendly brokers", or "long-term investment banking associates", has assembled sufficient additional convertible income bonds and common stocks of C&EI to provide Missouri Pacific with a potential 51 percent of the voting securities of the C&EI.

It now appears that in 1962 and 1963 the Missouri Pacific and these two brokerage houses executed certain option agreements making it possible for the Missouri Pacific, seemingly whenever it wished to exercise the right, to acquire about $4.8 million in C&EI convertible bonds. The brokers apparently also directly hold about 60,000 shares of C&EI common stock (about 8 percent of voting stock) in their own names. The bonds were *actually purchased* by Missouri Pacific in February, 1964, and were transferred immediately to the existing independent voting trusts described in the majority report. It is not clear at all, however, at what times these securities were purchased by the "friendly brokers" pursuant to the option agreements.

Because these circumstances have come to light only in recent months, (there apparently having been no disclosure of the option agreements prior to August, 1964), there has been no opportunity for this Commission to evaluate the net practical effect of the alleged transactions on the balance of C&EI control in the period between 1962 and February, 1964. Bearing in mind the Missouri Pacific's continuing position since 1961 that it has done nothing wrong at any time, the new allegations have obvious and significant relevance to the question whether Missouri Pacific has willfully disregarded the principles stated in the *Central of Georgia* case, and whether in accordance with that precedent its application should be denied. It should

be remembered that by August 1961 the Missouri Pacific had acquired power to control the C&EI and that it retained that power directly in its own name for an 8-month period, until well after it had filed its present control application. This control was obtained by the Missouri Pacific less than three years after the Commission in *Central of Georgia* denied the application of the St. Louis-San Francisco Railway (Frisco) for approval of its control of the Central of Georgia Railway. That denial was on the ground that the Frisco already had acquired such control illegally. At 307 I.C.C. 43, 44, the Commission pointedly said:

> * * * The public interest is concerned not only with improvements in transportation service, but also with the maintenance of respect for and the observance of the law. If the Frisco is permitted to retain the fruits of its unlawful conduct, and we sanction such conduct, which we consider to have been in flagrant disregard of the law, others will be encouraged to pursue a like course and to present a *fait accompli* for our approval. Obviously, such is not in accord with the intent of the statute; i.e., that we pass upon "proposed" acquisitions of control prior to their consummation, including the justness and reasonableness of the terms upon which such control is to be acquired. If the indicated practice were generally followed, our administration of the statute in the public interest would be seriously hindered, if not defeated. Here, the Frisco not only acquired a majority of the Central's outstanding voting stock without our authorization, expending a large sum of money therefor, but it continued to purchase additional shares even after entry of division 4's order of April 12, 1956, instituting an investigation to determine whether or not the Frisco was in violation of section 5(4), and subsequently after service of an examiner's proposed report recommending that we find that control of the Central by the Frisco had been accomplished and was continuing in violation of such section. [Footnote omitted] We are unable to accept the Frisco's profession of good faith in the premises.

It has been subject to regulation by us for many years, and its officers and counsel knew or should have known of the requirements of section 5.

The public interest would be well served, I believe, by a careful analysis of applicant Missouri Pacific's transactions in C&EI securities between 1961 and the present time. This ought to be done not simply as a punitive measure against Missouri Pacific, but as part of a thorough reexamination of relevant ICC guidelines on inter-carrier securities purchased under Section 5 of the Interstate Commerce Act. The continuing movement toward railroad unifications throughout the country and the obviously intensifying temptations to carriers in the positions of Missouri Pacific and the L&N to buy influential interests in the ownership of potential acquisitions like the C&EI, make imperative the articulation of basic ground rules equally applicable to all railroads involved in or considering Section 5 transactions. The *fait accompli* presented for Commission approval in these proceedings should be made the last.

APPENDIX A

EXCERPTS FROM THE REPORT AND ORDER OF HEARING EXAMINER

Chicago & Eastern Illinois

Description, etc. Eastern was incorporated in June 1940, and as a consequence of reorganization proceedings,[1] on January 1, 1941, acquired the business assets and property of a predecessor company. The earlier company had existed as an Illinois corporation since 1920 as successor in reorganization to the Chicago & Illinois Railroad Company, chartered in 1894 as a result of consolidation of other

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[1] *Chicago & E. I. Ry. Co. Reorganization*, 242 I.C.C. 259, decided October 24, 1940.

Railroads. On a map, the lines of Eastern appear roughly as an inverted letter "Y", having its base at Chicago and stem extending southwardly to Woodland Junction, an easterly arm extending in a southerly direction via Danville[2] to Evansville, Ind., and a divided westerly arm extending southwesterly via Villa Grove and Findlay through East St. Louis to St. Louis, Mo., and southerly from Findlay to Thebes and continuing to Illmo and Chaffee, Mo. Other principal lines extend from Danville to Villa Grove; from Fort Branch (north of Evansville) in a southwesterly direction to Mt. Vernon, Ind.; and from Cypress (north of Thebes) southeasterly to Joppa.

As of December 31, 1961, Eastern operated 862.5 miles of first main tracks, of which it owned 744.54 miles, and other railroads owned 117.96 miles; and 142.56 miles of second main tracks, of which it owned 97.2 miles, and other railroads owned 45.36 miles. * * *

Under trackage rights and other joint-use arrangements, Eastern operates as follows:

From	To	Owner Railroad	Main Mileage First	Main Mileage Second
Chicago	Dolton Jct.	Chgo. & West Ind. RR	16.87	16.87
Pana	Granite City	New York Central	76.11	7.66
Granite City	St. Louis	Term. RR Ass'n of St. L.	9.00	8.91
Thebes	Bridge Jct.	Illinois Central RR (*)	1.31	—
Bridge Jct.	Illmo	Sou. Ill. & Mo. Bridge Co.	4.65	4.40
Illmo	Rockview, Mo.	St. L. S. W. Ry.	7.60	7.52
Rockview	Chaffee	St. L. San Fran. Ry.	2.42	—

(*) Maintained by Eastern.

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[2] All points hereinafter named are in Illinois unless otherwise shown when initially mentioned, or, are large metropolises so well known that the state identity is commonly recognized.

Eastern is characterized as an independent bridge line linking Chicago and points north and west thereof, on the one hand, and, on the other, Evansville, with connections to and from points in the south and southeastern territories; and between Chicago and points north and east of Chicago, on the one hand, and, on the other, St. Louis and Chaffee, with connections to and from points in the southwestern and western territories. It also provides line-haul railroad service from and to important points on its lines in conjunction with other railroads, and with its connections forms the shortest freight routes between Chicago and important terminals in the Southeast and Southwest. Including various switching, terminal, belt, and subsidiary and affiliated railroads, Eastern connects with more than 50 railroads, of which approximately half are major first-class trunk-line carriers serving the aforementioned traffic territories. Interchange is made with such railroads at 43 stations. For example, at Chicago, Eastern connects with 38 railroads of all descriptions; 23 at St. Louis-East St. Louis; 5 at Evansville; 4 at Chicago Heights; 3 each at Dolton, Danville, Pana, Thebes, and Mr. Vernon, Ill.[3], and Terre Haute, and Vincennes, Ind., and 2 each at Momence, Tuscola, Sullivan, Salem, and Benton, Ill., and Brazil, Ind.

Eastern's interests in affiliated companies, as of December 31, 1961, includes sole ownership in a switching carrier at Chicago Heights, and joint ownership with other railroads in five additional active switching, terminal, or line-haul railroads, shown as follows:

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[3] Mt. Vernon, Ill., is intermediate between Findlay and Thebes; Mt. Vernon, Ind., is the terminus of the line branching from the Evansville line.

Carrier and Service	Ownership	Number of Miles Owned	Number of Miles Operated	Area
Chicago Heights Terminal Transfer Railroad Company— Switching service	Sole	30	30	Chicago Heights
Belt Railway Company of Chicago— Switching Service	1 of 13	—	435	Chicago
Chicago & Western Indiana Railroad Company— Switching, terminal, passenger service	1 of 5	564	148	Chicago and suburbs
Terminal Railroad Ass'n. of St. Louis— Switching and terminal service	1 of 16	212	360	St. Louis-East St. Louis
Illinois Terminal Railroad Company— Freight service	1 of 11	225	334	St. Louis area and Illinois
Jefferson Southwestern— Railroad Company— Freight service	1 of 3	11	—	Mt. Vernon, Ill., to coal fields

By Illinois Commerce Commission's certificate of public convenience and necessity No. 4700 MC, issued March 3, 1955, Eastern holds authority to engage in transportation within Illinois as a common carrier of property by motor vehicle, limited to operations over specified routes between designated points within Illinois in the handling of commodities generally, including all classes of property usually and customarily handled by railroad freight. Pursuant to the second proviso of section 206(a)(1) of the Interstate Commerce Act, the aforesaid certificate was accepted as of October 15, 1962, as amendment to No. MC-57688, in lieu of the several prior filings of certificates issued by the Illinois Department of Public Works and Buildings under Ill. L. R. 3781, issued February 20, 1941, and extensions thereof. Pursuant to the provisions of section 206(a)(7) of the act (amendment of October 15, 1962, by Public Law 87-805), Eastern filed an application for motor carrier "grandfather" certificate of registration on December 23,

1962, No. MC-57688 (Sub-No. 2). During the pendency of such request, Eastern lawfully may continue the operations conducted under the filing pursuant to the former second proviso of section 206(a)(1).

Under the aforesaid filings, Eastern lawfully engages in interstate or foreign commerce, conducting the same operations it is authorized to perform in intrastate commerce under the state certificate in question. Its for-hire truck transportation is conducted almost entirely by local contract carriers operating under the railroad's certificated authority. Eastern owns practically no truck equipment and has no employees engaged in motor carrier operations. However, it owns approximately 250 trailer units used in piggyback service.

The final value of the railroad and equipment properties of Eastern, as determined by the Commission for rate-making purposes as of June 30, 1915, is shown by the applicants as $74,858,402,[4] and the net cost of additions and betterments less retirements subsequent to the date of valuation to December 31, 1960, is shown as $41,956,078.

Train service and traffic.—Eastern's principal through freight trains operate daily, as of and since January 1, 1962, between Yard Center at Chicago, and Mitchell Yard at St. Louis, leaving Chicago at 10:30 p.m. and 1:30 p.m., and leaving St. Louis at 10:00 a.m. and 7:00 p.m.; and between Chicago and Wansford Yard, Evansville, leaving Chicago at 9:00 p.m. and 6:30 a.m., and leaving Evansville at 4:00 a.m. and 7:30 p.m. The 9:00 p.m. Chicago departure and the 7:30 p.m. Evansville departure were initiated near the end of 1961, and operate on nonstop schedules of 9 hours and 30 minutes in each direction. Eastern also operates

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[4] Final value found and reported in *Valuation Docket No. 202*, 31 Val Rep. 1, shows property owned and used for common-carrier purposes $63,606,000, property owned but not used $1,503,500, and property used but not owned $4,997,844.

local freight trains and turnaround road-switcher trains on alternate week days in each direction, or, on 6-day assignments between designated subdivision terminal points. Passenger train schedules are limited to three trains in each direction between Chicago and Evansville, operating in conjunction with schedules of Dixie Line in through service to and from Atlanta, New Orleans, and other southeastern points. *** By eliminating trains and modifying schedules pertaining to the remaining trains, Eastern has reduced passenger service in recent years.

The lines of Eastern are situated in areas which are principally agricultural and mining in development, and many of the points served are important industrial centers which receive shipments of products of mines and processed raw materials, and originate shipments of miscellaneous and manufactured articles. Bituminous coal, measured in net tonnage and gross revenues produced, is the most important commodity handled by Eastern. ***

Financial data.—The financial results of operation of Eastern, measured by income available for fixed charges, declined from about $5.5 million in 1952 to $913,000 in 1960; and net income after fixed and contingent charges and the payment of applicable Federal income taxes, but, before capital and sinking-fund appropriations, declined during the same years from $2.7 million to $966,000 deficit. Each of the foregoing totals reflected in 1961 as about $2.1 million and $300,000, respectively. The computations underlying the foregoing, and comparable data for 1959, 1960, and 1961, include significant income account items, as follows:

	1959	1960	1961
	(In Thousand Dollars)		
Operating revenues:			
Freight	$30,905	$28,926	$28,689
Passenger	2,033	2,144	2,040
Mail and Express	2,272	2,188	2,221
All other	1,150	1,112	1,105
Total operating revenues	36,360	34,370	34,055
Operating expenses:			
Maintenance—way & structures	4,287	4,403	4,075
Maintenance—equipment	6,238	6,373	5,598
Transportation	14,176	14,292	13,932
Traffic, General, Miscellaneous	3,819	3,798	3,543
Total operating expenses	28,520	28,866	27,148
Railway tax accruals	2,734	3,830	2,753
Equipment rents—net debit	2,037	1,853	2,283
Joint facility rents—net debit	556	517	499
Non-operating income—net	583	609	798
Income available for fixed charges	3,096	913	2,170
Fixed charges:			
Rental for leased roads	184	184	184
Interest and discount on debt	1,369	1,725	1,686
Contingent interest:			
General mortgage income bonds	585	—	—
Income debentures	598	—	—
Federal income taxes	—	—	—
Net income	360	(996)	300
Depreciation included in maintenance expenses	$2,362	$2,530	$2,458

( ) denotes deficit

The totals of Eastern's balance-sheet accounts of the last day of 1959, 1960, and 1961, summarized in condensed form, are shown as follows:

	1959	1960	1961
	(In Thousand Dollars)		
ASSETS			
Current Assets:			
Cash and temporary investments	$ 659	$ 388	$ 1,282
Materials and supplies	1,886	2,550	2,245
Other current assets	4,157	3,702	4,642
Total current assets	6,702	6,640	8,169
Investments:			
Sinking funds, capital and other reserves, and other investments	66	244	499
Investments in affiliated companies	9,149	9,571	9,982
Total investments	9,215	9,815	10,481
Properties:			
Road	55,531	54,941	55,096
Equipment	63,185	61,487	57,831
General expenditures	72	72	72
Improvements—leased prop'ty	5	5	5
Acquisition adjustments—credit	289	289	289
Donations and grants—credit	257	271	298
Total transportation property	118,247	115,945	112,417
Accrued Depreciation and Amort'zn			
Road—credit	4,522	4,744	4,915
Equipment—credit	20,091	20,550	20,453
Total	93,634	90,651	87,049
Miscellaneous Physical Prop'ty	2,127	2,165	2,041
Total property less recorded depreciation and amortization	95,761	92,816	89,090
Other Assets and Deferred Charges	945	1,572	1,639
Total Assets	$112,623	$110,843	$109,379

	1959	1960	1961
	(In Thousand Dollars)		
LIABILITIES			
Current Liabilities—Total	$ 8,808	$ 8,056	$ 10,216
Equipment Obligations and Other Debt Due Within 1 Year	3,039	3,105	2,884
Long Term Debt:			
First mortgage bonds	7,864	7,658	7,561
General mortgage bonds	11,705	11,701	11,701
Income debentures	12,334	12,334	12,334
Equipment obligations	24,942	22,117	18,878
Other purchase agreements	379	3,464	3,222
Total long term debt	57,224	57,274	53,696
Pension Casualty and Other Reserves	235	242	229
Other Liabilities and Deferred Credits	250	491	316
Shareholders' Equity			
Capital stock (Note 1)			
Class "A"—$40 par value	3,014	3,014	3,004
Common—no par value	19,358	19,358	19,356
Total	22,372	22,372	22,360
Capital Surplus	30	31	103
Retained Income			
Appropriated	8,961	9,060	9,360
Unappropriated	11,704	10,212	10,215
Total Shareholders' Equity	43,067	41,675	42,038
Total Liability and Shareholders' Equity	$112,623	$110,843	$109,379

(Note 1)—Excludes stock held for exchange of general mortgage bonds.

Summaries of Eastern's *** working capital, exclusive of equipment obligations and other indebtedness due within 1 year, shown hereinbelow reflect a decline from a relatively comfortable position in 1950 to annual working capital

deficits since 1958. Likewise, the ratio of working capital to annual fixed charge requirements, and to gross revenues have worsened practically every year, and reflect negative relationships since 1958:

Working Capital Relationships

End of Year	Cash Items	Working Capital	Number of Years of Fixed Charges Requirements Covered by Working Capital	Working Capital as a Percentage of Gross Revenue
	(In Thousand Dollars)			
1950	$4,119	$3,565	3.98	11.66
1958	1,415	(70)	(0.06)	(0.20)
1961	1,282	(2,047)	(1.09)	(6.01)

( ) denotes deficit

Eastern's working capital has declined during the past decade despite application of Federal income tax credits each year since 1954; contingent interest payments on convertible mortgage bonds and income debentures have not been earned or paid in several recent years; and except in 4 of the last 12 years, annual depreciation account funds were not sufficient to meet the total annual equipment obligation maturities. Significant factors pertaining to Eastern, such as (a) transportation ratios, (b) operating ratios, (c) percentage of gross revenues carried through to net railway operating income before income taxes, and (d) ratios of earnings to fixed and contingent charges before appropriations to sinking and other reserve funds, in comparison with statistics of other railroads[5] which depend largely upon coal traffic, make [it] evident that Eastern has experienced operating performance of low efficiency,

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[5] Namely: Chicago, Milwaukee, St. Paul & Pacific; Dixie Line; Missouri Pacific; New York Central; Pennsylvania; Chesapeake & Ohio; Norfolk & Western; Chicago, Rock Island & Pacific; Illinois Central; Chicago, Burlington & Quincy; Chicago & North Western; Gulf, Mobile & Ohio; and Baltimore & Ohio.

generally poorer than shown by comparable railroads operating within the same territory. Further, its fixed charges are disproportionately heavy in relation to its gross revenues and earning power. In these respects, a reasonable appraisal supports the assertions of virtually every party to these proceedings, that Eastern presently is in a precarious financial position, and that unless means are found to reverse the trend, it may face another reorganization.

Securities. The outsanding capital stock of Eastern as of December 31, 1961, included 75,105 shares of class A preferred stock of $40 per share par value, which provide for the payment of maximum dividends of $2 per share annually; and 430,717 shares of common stock of no par value. Each share of the class A and each share of the common stock has the right to one vote with the right to cumulative voting for the election of directors. No other securities issued are vested with the right to vote. On the date shown, 1,879 owners of the outstanding shares of capital stock were of record.

Among the unmatured secured obligations of Eastern * * * are outstanding general mortgage income bonds issued January 1, 1941, to mature January 1, 1997, bearing 5-percent interest per annum contingent upon earnings each year. Unearned and unpaid interest payments are not recoverable upon maturity or otherwise. As of December 31, 1961, the unmatured income bonds outstanding had an aggregate face value of $11,700,500. The lien on properties of Eastern supporting the general mortgage income bonds is junior to the lien of the existing first mortgage bonds, series B, C, and D. The income bonds are subject to call for redemption prior to the maturity date; and at the holders' request are convertible into fully paid, nonassessable shares of common stock at the rate of 41,305 shares for each bond of $1,000 face value. No other debt securities of Eastern are convertible into stock.

In the event that all the income bonds should be converted the total number of common stock shares would be increased to about 914,006, and the proportionate voting power of the capital stock issues would be modified accordingly. The voting power of the class A stock would be reduced from about 14.85 percent of the total voting strength to about 7.59 percent; and the voting power of the common stock as presently existing would be diluted by more than 100 percent.

Pursuant to provisions of Eastern's corporate charter, so long as any class A stock remains outstanding the favorable vote of two-thirds of the owners thereof as a class, is required to authorize any consolidation, merger, lease or sale not resulting in liquidation, the sale, lease, exchange, or other disposition of the property and assets of Eastern; or, to amend, alter, or repeal any of the provisions of the certificate of incorporation or by-laws which have reference to, or which are protective of the designation, rights, preferences, qualifications, limitations, restriction, voting rights, values, and interests of the class A stock. The articles also provide that the whole or any part of the outstanding class A stock may be called for redemption by payment in cash of $40 per share, plus accumulated and unpaid dividends. By order in Finance Docket No. 20896, *Chicago & E. I. R. Co. Stock*, dated December 16, 1960, Eastern was authorized to issue not exceeding 174,745 shares of its no-par-value common stock, pursuant to a proposed offer to exchange common stock for the outstanding class A stock, contingent upon the common stock having a market value of at least $17.25 per share. As of October 29, 1962, the Commission was advised that the prescribed market price had not been reached and that no additional shares of the common stock had been issued.

RAILROAD OWNERSHIP OF EASTERN'S SECURITIES

Acquisition by Missouri Pacific. The respective managements of Eastern and Missouri Pacific, by informal negotiations commenced as early as July 1959, gave consideration to, and initiated studies looking toward the possibility of merging the properties of their railroads. Missouri Pacific indicated it would prefer to acquire Eastern's securities by purchase for cash. Inquiries by the president of Eastern as to sizeable blocks of shares available at $25 per share, if offered, failed to find willing sellers. In about September 1959, Missouri Pacific engaged an independent firm of consultant engineers to conduct preliminary studies to develop acceptable bases for a merger transaction. Several tentative offers were made for the exchange of stock and securities of the two companies. By letter dated December 17, 1960, Eastern rejected a final proposal by Missouri Pacific, and further consideration was terminated. Missouri Pacific's president asserted on the record herein that contemplation of merger with Eastern never was abandoned.

Among the principal individual owners of stock and securities of Eastern was one Henry Hammack of Kansas City, who for many years had large holdings and was represented by two persons on Eastern's 13-member board. Hammack himself did not serve as director or officer of the company. During the earlier search on behalf of Missouri Pacific for securities available for purchase, Hammack had rejected offers to sell for cash because of tax implications. Hammack died in September 1960. In late July 1961, after separate negotiations with Dixie Line had not materialized, the Hammack estate offered the Eastern block of securities to several railroads believed to be interested in its acquisition. On August 3, 1961, Missouri Pacific agreed to purchase the Hammack block at a package price of $1,400,000, and the sale was consummated on

August 11. On August 14, 1961, Eastern's president was advised that Missouri Pacific was preparing to file an application to acquire control of the company. The Missouri Pacific board of directors authorized such filing on September 13, 1961, and within a few days it was filed with this Commission (Finance Docket No. 21755).

Between August 3 and November 14, 1961, the date of filing of an amendment to its application to revise the data therein, Missouri Pacific disposed of the debenture bonds included in the Hammack package and made additional purchases of Eastern securities. On the date shown, its total holdings consisted of 23,600 shares of class A stock, 74,104 shares of common stock, $670,000 principal amount of convertible income bonds, and $220,000 face amount of income debentures. In addition, Western Coal & Mining Company, a wholly owned subsidiary of Missouri Pacific, owned $300,000 face amount of the convertible income bonds, acquired between December 4, 1959, and March 7, 1960. At the time of the hearing herein, Missouri Pacific's ownership (including the subsidiary's holdings) were equivalent to proportionate ownership of the total outstanding issues of each class, as follows: Common stock—17.2 percent; class A stock—31.42 percent; and convertible income bonds—8.29 percent. Computed on the assumption that the right to convert the income bonds to common stock would be fully exercised on the basis of 41.305 shares per each $1,000 of the bonds owned, Missouri Pacific's total holdings of common stock would increase to 114,170 shares, or 24.25 percent of the total outstanding. In conjunction with the voting rights of the class A stock, Missouri Pacific would be entitled to 137,770 votes, or the equivalent of 25.24 percent of the total converted voting power, in contrast with the 19.31 percent of the total votes held by Missouri Pacific prior to the conversion of the income bonds. * * *

The Hammack estate demanded approximately 40 percent more than the aggregate prevailing market price for

the sale of the Eastern securities. * * * Having acquired the Hammack holdings, the president of Missouri Pacific, about October 13, 1961, indicated to Eastern's management that it should favorably consider two directors nominated by Missouri Pacific to replace the persons who theretofore had represented Hammack. Offered as possible nominees were the names of an officer of Northwestern University, Evanston, Ill., and a representative of a leading trust company of St. Louis, both of whom are described as highly capable and respectable persons of considerable financial experience. Such persons had no intimate connection with Missouri Pacific and were not proposed to serve the interests of that company. The Hammack directors chose to serve out the balance of their terms, and Missouri Pacific was so advised. * * * the matter was not pressed further by Missouri Pacific.

* * * In order to secure sufficient of the Eastern securities to become vested with majority control, Missouri Pacific proposes to make additional purchases after control is authorized. For this purpose, the board of Missouri Pacific on January 31, 1962, appropriated $6 million.

Missouri Pacific denied throughout these proceedings * * * that it has not in any manner, alone or in conjunction with others, attempted to use its minority interests to exercise or effectuate direct or indirect control of Eastern, or to influence its actions or policies. At hearing on March 16, 1962, counsel announced that Missouri Pacific would not exercise its stock voting power, or delegate such powers to proxies, at the annual stockholders meeting of Eastern on May 11, 1962, or at any future time unless authorized to control Eastern. Also at that time, for fear that its motives would be misunderstood, Missouri Pacific asserted it would not place the stock and securities of Eastern in any trust arrangement conceived to provide insulation from the stock rights.

The board of directors of Missouri Pacific, on April 9, 1962, in consideration of various factors related to the entire proceedings herein, conveyed the shares of Eastern common stock and class A stock to the Marine Midland Trust Company of New York as trustee; and vested in the trustee for a term expiring April 20, 1972, unless otherwise sooner terminated, the power to exercise in its unrestricted discretion the voting rights incident to the aforesaid stocks. The trust would apply equally to any additional shares of such securities which Missouri Pacific in the future may purchase or otherwise acquire. * * * Missouri Pacific avers that the action in establishing the voting trust was taken in hopes of avoiding any delay in the disposition of the pending application to acquire control of Eastern, and to avoid any adverse result of the Commission's investigation of alleged unlawful acquisition and continuation of control of Eastern. * * *

Acquisition by Dixie Line. Since May 1960, Dixie Line has had under consideration methods of achieving possible unification of Eastern's lines with those of Dixie Line. Such interests center primarily about the lines between Evansville and Chicago, which could provide Dixie Line with new direct-line first-class freight and passenger service to and from Chicago and areas beyond Chicago, and points between Chicago and Evansville. At the time it became interested, Dixie Line was aware that Missouri Pacific was actively considering the possibility of some type of unification involving its lines and those of Eastern. Dixie Line had received assurances that in the event a merger of Eastern into the Missouri Pacific system were authorized, the latter would provide a regular high-grade service between the Chicago and Evansville gateways, or, would consider the possibility of arranging for Dixie Line to have direct access to and from Chicago via Evansville. Following termination of the merger studies with Missouri Pacific (December 1960), the president of Eastern, anxious to effect affiliation with a strong trunk line railroad, ap-

proached Dixie Line executives to explore some satisfactory form of unification as a means of solving Eastern's continuing traffic deficiencies and its worsening depressed financial position. Early in 1961, Dixie Line decided to study the possibilities of merger of Eastern with itself. It engaged Wyer, Dick & Company, the firm of consultants which had investigated the same proposition on behalf of Missouri Pacific * * * The Wyer company undertook a detailed study of the benefits to be achieved in effectuating merger of Eastern and Dixie Line. While the studies were still incomplete, and Dixie Line remained undecided as to a course of action, on July 19, 1961, Dixie Line was accorded the opportunity to purchase the Hammack block of Eastern securities. Because it had reached no determination as to merger, and as it believed the Hammack holdings were overpriced, Dixie Line delayed consideration of the offer. Early in August, Dixie Line was informed that Missouri Pacific had agreed to purchase the Hammack block of securities.

* * * The president of Eastern apprised Dixie Line that certain individual holders of large blocks of securities of Eastern, including several of its directors, desired to dispose of their respective holdings. Missouri Pacific earlier had declined to purchase those shares after acquiring the Hammack block. Preliminary arrangements were made for Dixie Line to make the purchases. Thereupon, on September 7, 1961, Dixie Line established a trust agreement with the Bank of New York, under the terms of which the bank would purchase the available securities with funds supplied by Dixie Line. As an independent trustee, the stocks and bonds purchased, and any later acquired by, or for the Dixie Line during the period of the trust, would be conveyed to the bank and held by it.

Among other things, the trust agreement empowers the trustee to exercise the voting powers of the stocks in question for the election of directors, and as to other

matters except those relating specifically to the acquisition of control of Eastern by Dixie Line or by any other company. * * * Dixie Line reserves the right to sell or make other disposition of the whole or any part of the securities in question to any person other than an affiliate of Dixie Line. Unless sooner terminated by other eventualities specified in the agreement, the trust relationship would terminate on September 6, 1971. Except under the foregoing trusteeship, the Bank of New York has no relationship with Dixie Line or its affiliates.

No securities of Eastern were acquired by Dixie Line prior to the date of the trust agreement. By agreements dated September 7 and 8, 1961, Dixie Line contracted to purchase the available securities from the stockholders previously contacted. By the terms of the agreements, on or before September 20, 1961, the common stock would be purchased at the price of $13 per share (then current market price was about $11¾ per share), for delivery by the seller directly to the Bank of New York as trustee for Dixie Line. As a condition precedent, the contracts were subject to the holders of at least 90,000 shares of the capital stock, on or before September 15, 1961, agreeing to the sale of such stock for transfer to the trustee. The offer contained in the agreement was tendered only to those holders of Eastern securities with whom Dixie Line had had prior tentative understandings, and was not offered to stockholders generally. Administration of the aforesaid trusteeship has been delegated by the Bank of New York to its senior vice-president, Stuart L. deVausney, in charge of the bank's corporate agencies department. To represent the bank in its capacity as independent trustee, Mr. deVausney was elected member of the board of directors of Eastern on May 11, 1962.

Under the trust agreement and related sales agreements, described hereinabove, Dixie Line acquired 117,132 shares of Eastern common stock, largely from directors of the

company.[6] Additionally, purchases on the open market through the trustee were made of 20,600 shares of common stock at prices not exceeding $13 per share; 750 shares of class A stock at prices ranging from $20.25 to $22.50 per share; and $206,000 principal amount of general mortgage convertible income bonds at prices ranging from $450 to $575.50 per $1,000 bond. The shares of stock so acquired represent approximately 27.5 percent of the outstanding voting stock of Eastern and entailed the expenditure of $1,861,700 from Dixie Line's current funds.

Officials of Dixie Line acknowledge the belief that acquisition of the stock and bond interest in Eastern constituted an initial step in a move to attain control of that railroad in light of the prospects of a merger having become unlikely. In their opinion, on the assumption that control could be effectuated, the investment in Eastern securities was sound and would benefit Eastern and Dixie Line. * * *

MISSOURI PACIFIC PROPOSAL

Description and purpose. Missouri Pacific operates lines of railway in Arkansas, Colorado, Illinois, Kansas, Louisiana, Missouri, Nebraska, Oklahoma, and Texas. * * * It also is sole owner and operator of several subsidiary belt line, terminal, and connecting railroads, and an interstate motor carrier named Missouri Pacific Freight Transport Company (Mopac Transport),[7] MC-89723, and related subsidiary dockets. * * * The principal points for interchange of traffic between Missouri Pacific and Eastern are St. Louis, East St. Louis, and Thebes. Interchange points

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[6] Including 2,100 shares of common stock from president-director D. O. Mathews, and blocks up to 27,000 shares each from directors A. S. Igleheart, A. Hulman, Jr., R. H. George, J. J. Nowicki for the Reiss Coal Company, D. M. Johnson, R. Holden, and F. S. Yantis.

[7] Formal title changed to Missouri Pacific Truck Lines, Inc pursuant to order dated July 13, 1962.

for the through movement of coal from fields in southern Illinois via Eastern and Missouri Pacific are Benton and Mount Vernon. Control of Eastern's lines and operations, in effect, would extend Missouri Pacific's lines through the St. Louis gateway and Thebes, and would afford direct lines to and from the Chicago area.

Consolidated financial statements of Missouri Pacific and its majority-owned subsidiaries, reflect railway operating revenue of nearly $325,000,000 in 1961, net income after fixed charges, prior to Federal income taxes, in excess of $24,000,000; and combined retained income at the end of 1961 of $177,000,000. The net working capital of Missouri Pacific, excluding subsidiary companies, in 1961 amounted to nearly $32,000,000. * * *

Under the proposed control by Missouri Pacific, Eastern would retain its identity as an independent carrier and would continue operating with its own departments, officers, and solicitation and sales forces. Missouri Pacific would have representation on the board of Eastern. * * * The separate facilities of both railroads would be coordinated to permit joint use wherever feasible, in order to achieve continuing economies. It is Missouri Pacific's view that the benefits it would derive from having direct line access to the Chicago area would afford faster and better service to the public; would provide more direct service to markets heretofore not reached by lines of Missouri Pacific's system; and would result in joint control of end-to-end connecting railroads which are competitive only to a slight degree. Missouri Pacific's essential objective is to extend its direct-line service over Eastern's facilities to and from the Chicago area, and thus to improve participation in the through movement of transcontinental and southwestern territories traffic by offering more frequent and expedited schedules over improved interline routes.

Missouri Pacific would be able to make credit available to Eastern under arrangements making Missouri Pacific's claims junior to the existing first mortgage bonds. * * * Missouri Pacific also would instigate arrangements to provide for joint use of facilities and equipment to obviate the need for Eastern to undertake early new expenditures for such properties, and that the continued improvement in Eastern's finances would remove the present necessity to dispose of valuable railside real estate suitable for industrial development. For reasons that availability of improved service by strong railroads would be especially attractive to shippers, Missouri Pacific proposes to supply the efforts of its own highly developed and successful industrial department in cooperation with Eastern's forces to promote the location of new industry plants on and near Eastern's lines, and the expansion and diversification of industries already served by Eastern. Thus, more transportation business would be generated for Eastern in which Missouri Pacific also would benefit.

Design for operations. As represented on behalf of Missouri Pacific, its coordinated operations with Eastern under common control would achieve reduced costs of operation and increased efficiency. The present separate operations would be modified in four basic respects, as follows: (1) Establishment of through freight service between Chicago on the one hand, and, on the other, points in the southwest via Thebes; (2) affording direct interchange of cars at Missouri Pacific's 23rd Street yard in St. Louis, and as a consequence, a drastic reduction in use and the probable elimination of Eastern's Mitchell yard about 10 miles north of East St. Louis; (3) pooling of freight car and locomotive equipment into a single reservoir for use of Missouri Pacific and Eastern; and (4) utilization by Eastern of Missouri Pacific's extensive supply of roadway mainte-

nance and repair equipment. Additional economies would be realized in reduction of the combined overhead and transportation costs, and expenditures for maintenance and other operational purposes.

* * * Missouri Pacific would construct 1,005 feet of new direct connecting tracks between its line and Eastern's. The connection would be at Fayville, about 5 miles south of Thebes, and is estimated to entail the expenditure of about $25,195. The distance between Chicago and Thebes via the Fayville connection would be 378.5 miles compared to 413.7 miles via the East St. Louis gateway, providing a savings of 35.2 miles.

Should control be authorized, Missouri Pacific would propose the institution of two combined Missouri Pacific-Eastern freight schedules daily in each direction via Thebes between Chicago and points in the southwest, in addition to trains Nos. 360 and 370, now operated to and from the Gulf Coast area including points in Texas east of Houston, points in Louisiana, and southern and eastern portions of Arkansas, which originate paper, chemicals, and other high grade commodities. * * *

The proposed new service via Thebes, and the total scheduled time thereof, and comparisons with the present Eastern-Missouri Pacific schedules via East St. Louis, and with the existing best competitive schedules via the direct routes or connecting-line routes of other railroads, are shown as follows:

	Scheduled Time					
	Proposed via Thebes		Present via East St. Louis		Present (*) Other Routes	
Northbound	Hr.	Min.	Hr.	Min.	Hr.	Min.
Los Angeles to Chicago	87	30	99	00	86	30
El Paso to Chicago	53	15	71	30	47	45
Dallas to Chicago	33	30	47	30	52	45
Houston to Chicago	44	30	74	30	54	00
San Antonio to Chicago	51	00	62	30	56	20
New Orleans to Chicago	45	30	75	30	28	00
Southbound						
Chicago to Los Angeles	62	00	74	30	57	00
Chicago to El Paso	41	30	54	00	35	15
Chicago to Dallas	34	30	47	00	33	00
Chicago to Houston	40	30	53	00	51	00
Chicago to San Antonio	43	00	55	30	52	05
Chicago to New Orleans	42	30	55	00	28	00

(*) Involves applicable direct routes of:

Atchison, Topeka & Santa Fe Ry. Co.
Illinois Central RR Co.; and

Interline routes of:

Southern Pacific Co.—Chicago, Rock Island & Pacific RR Co.;
Southern Pacific Co.—St. Louis Southwestern Ry. Co.—
Illinois Central RR. Co.

The potential savings in scheduled time would be correspondingly reflected in through multiple-line routes between New York and the southwestern points named in the foregoing tables. * * * The schedules via Thebes (10 hours and 30 minutes in each direction) contemplate continued use of the Thebes line, if maintained to the present standard of normalcy, but, greater shrinking of the overall elapsed time could be achieved if the aforesaid line is upgraded and thereafter maintained to permit operations at speeds prevailing on Missouri Pacific's connecting lines. Under such circumstances, the elapsed time between Chicago and Thebes would be reduced to about 8 or 9 hours in each direction. The proposed 10.5-hours running time schedules envision through train service, with no local service at intermediate points. However, those trains

would be able to make one straight set-off for Joppa traffic and the local business on the Joppa side line. If the physical condition of the Thebes line is improved and the 8- or 9-hour schedules be instituted, such trains could not be scheduled to continue handling the Joppa set-off.

Creation of new schedules via Thebes, in order to avoid multiple terminal and yard services at St. Louis and East St. Louis, would not result in reduction of train service through East St. Louis. However, Missouri Pacific's proposal would enable reducing the use of, or entirely eliminating Eastern's Mitchell yard, situated in East St. Louis.
* * *

Missouri Pacific proposes the by-passing of Mitchell yard in favor of interchanging traffic directly with Eastern at the 23rd Street yard. Such arrangement would permit the reduction of approximately 9 hours terminal time on traffic moving through the St. Louis-East St. Louis gateway. * * * the direct connection at St. Louis would have the effect of decreasing the total scheduled time for the delivery of traffic at western territory destination points by between 6 and 20 hours, and in the movement of eastbound traffic by about 10 hours. Unless the handling of interchange traffic between Eastern and connecting railroads other than Missouri Pacific at East St. Louis requires continued use of the Mitchell yard facilities, the entire yard would be abandoned.

Missouri Pacific envisions that control of Eastern would make it possible to pool Eastern's freight car equipment with that owned and operated by Missouri Pacific and its subsidiaries, Missouri-Illinois and Texas Pacific, for their common use. The objective would be to insure an adequate car supply for each company and the elimination of unnecessary empty car-miles. By pooling, Eastern would have available a dependable supply of cars necessary to alleviate car shortages, especially during peak grain seasons. Missouri Pacific presently has surplus supplies of

open-top gondolas and hopper cars. Because it serves the principal Gulf of Mexico export terminals it releases more unloaded box cars than are required to protect Missouri Pacific's own grain loading requirements. The excess of such cars could be channeled to Eastern via the Thebes gateway with a minimum amount of delay.

Under the proposed commonly controlled operations, improved car utilization and reduced empty car mileage in the movement of specially equipped cars now serving Chicago industries would occur. Arrangements would be made to hold unloaded special-type cars at Eastern's terminals in Chicago and Chicago Heights instead of returning the equipment empty to St. Louis. Other advantages of pooling freight cars pertain to the movement of equipment designed to handle auto parts, presently used in regular service between the Ford stamping plant at Chicago Heights and the Ford assembly plant on the Texas Pacific at Dallas. The total number of cars assigned to serve Ford could be reduced because elimination of the movement through the St. Louis area would reduce scheduled service at least 24 hours in each direction. Savings also would be effected by the joint utilization by Eastern of Missouri Pacific's approximately 120 "Damage Free" cars assigned to Midland, Mich., Chicago, and Evansville for operation over Eastern's lines between Chicago and St. Louis. The net result of the pooling of the combined freight car supply would permit Eastern to defer the need to make additional capital expenditures for new car equipment; to reduce its present costs for car maintenance; and to achieve a more favorable balance in regard to car-hire payments.

Reductions in operating costs also are contemplated by means of pooling the approximately 800 diesel locomotive units of Missouri Pacific, 200 units of Texas Pacific, and 90 units of Eastern. The combined utilization over the

through routes operated under the control situation would produce an increase in unit-miles operated, with fewer power unit requirements; would allow retirement of the older units; and would permit more efficient operation of a smaller fleet of locomotives. The opportunity to pool locomotives would arise in part from the institution of new schedules between Pueblo and Chicago via St. Louis, which would reduce detention time up to 19 hours each day at Chicago terminals on coupled sets of diesel units. * * * at least 3 diesel units per day (equivalent to 1,095 units per year) would be released from service, and the overall operation of the trains would be appreciably improved over that which presently is available.

Another area of potential reduction of Eastern's operating costs under the control desired by Missouri Pacific would involve use by Eastern jointly with Missouri Pacific of the latter's modern mechanized roadway maintenance equipment, including power jacks, ballast tampers, track lines, vegetation control cars, grading machines, and other heavy equipment. * * * Missouri Pacific would encourage the upgrading of portions of Eastern's lines by increasing the number of ties per mile, relaying light rail with heavier secondhand rail, improving drainage and ballast conditions, and considering the installation of continuous welded-rail sections. * * * Where found necessary, Missouri Pacific would recommend rehabilitation of those of Eastern's yards and terminals at which the existing facilities are inadequate, or, are in less than satisfactory physical condition.

As an incident to Missouri Pacific's request, it contemplates acquiring the authorization necessary to control Eastern's interstate motor carrier operating rights within Illinois, MC-57688, previously described in this report. Such rights would be combined with those of Mopac Transport, the wholly-owned subsidiary of Missouri Pacific, MC-89723

and subs thereto. The subsidiary's interstate and intrastate operations involve about 12,277 miles of certificated routes in various states, generally parallel to the lines of Missouri Pacific. Mopac Transport's operating equipment includes approximately 304 tractors, 922 semi-trailers of which about 582 are leased to Missouri Pacific for piggyback service, 86 bobtail, or 4-wheel trucks, and other auxiliary units. Except for about 7 miles of authorization over highways near Salem, and some 4 miles near Thebes, the motor carrier operating rights of Mopac Transport and Eastern do not duplicate each other, and are non-competitive.

Under the authorization issued to Eastern, it conducts motor carrier operations by the hiring of independent contract truckers which provide the operating equipment and personnel. By the exercise of its control of Eastern, Missouri Pacific would encourage the creation of a separate motor carrier subsidiary of Eastern and the acquisition of its own highway equipment. It also expects to aid Eastern in the expansion of motor carrier operations to provide greater coordination of rail-truck and substituted truck-for-rail service, which would provide more flexibility of operations and result in economies compared to the cost of all-rail service. The truck service by and for both railroads would be coordinated so that Eastern would be able to use Mopac Transport's reserve of equipment and otherwise improve its trucking operations as an adjunct of railroad service.

Missouri Pacific also anticipates that the new combined service would provide additional motor-carrier operations by Eastern and permit the development of an effective motor-rail sales organization to specialize in selling piggyback transportation for the benefit of both railroads.

Effect on traffic and revenues. The competitive position of the Chicago area as a gateway for the interchange of

traffic between railroads operating in the east and those of the west has improved considerably since about 1946. The principal reasons for the progress includes its physical proximity to numerous expanding producing and consuming areas; the direct connections at Chicago of transcontinental through routes to and from principal origin and termination points of the southwest, the middlewest, and the Arizona-California-New Mexico areas; the opening of the St. Lawrence Seaway; and the recent establishment of various new fast freight through schedules by railroads traversing Chicago in operating to and from Dallas, Fort Worth, Houston, and other principal areas in the southwest. Chicago's gateway status far exceeds that of the St. Louis-East St. Louis area for various reasons including the unavoidable delay of about 15 hours incurred at St. Louis because independent intermediate switching carriers are utilized to perform the interchange of traffic between the line-haul railroads participating in through movements.

Current schedules of 10 eastern railroads serving Chicago, list a total of 121 freight trains daily to and from the Chicago gateway, while the same railroads have only 42 daily scheduled freight trains to and from the St. Louis gateway; and schedules of 13 western-southwestern railroad lines list 126 daily freight trains to and from Chicago, and 75 to and from St. Louis; or, a total of 247 daily eastern and western railroad trains to and from Chicago, contrasted to 117 daily trains moving to and from the St. Louis-East St. Louis gateway.

In view of the existing situation, the through route service via Chicago has become so much preferred by the shipping public, that traffic routed via St. Louis no longer provides competitive service. Under the proposal to acquire control of Eastern and thus secure access to the Chicago area over lines of an affiliated company, Missouri Pacific would improve the combined through schedules as

a means of protecting its future participation in the affected traffic. The coordinated traffic solicitation efforts of Eastern's 49 sales representatives at 28 local offices, and Missouri Pacific's force of 279 representatives located at 78 offices, would generate substantial increased handling by Missouri Pacific and Eastern of freight traffic now transported by railroad over other combinations of lines, with or without participation by Missouri Pacific or Eastern. * * * service in combination with Eastern's routes also would enable the capturing of considerable freight tonnage that now is shipped by motor carriers which provide more expedited service and greater convenience than the railroads presently are able to effect.

* * * * * * * * * *

Studies by Missouri Pacific of advantages related to its control of Eastern, based upon various adjustments of results of earlier studies in consideration of merger possibilities, produced estimates of added freight revenue aggregating about $10.9 million annually, from and after about the fifth year of operation under common control. In summary, the estimated added gross revenues, adjusted to deduct related losses of switching revenues and decreased revenues derived from other traffic; the cost of providing the additional service contemplated; the resulting net income produced; and applicable divisions thereof amongst the affected railroads, are as follows:

Accruing to:	Additional freight cars	Additional revenues	Added cost of operation	Increased Income (*)
Eastern	91,596	$8,473,735	$2,374,595	$6,099,140
Missouri Pacific	8,278	1,653,949	1,650,143	3,806
Texas Pacific	3,401	850,764	344,050	506,714

(*) Net railway operating income before Federal income taxes.

Retention of existing routes, etc. Inevitably, the new combined routes of Missouri Pacific and Eastern would cause the loss of some portion of the freight traffic and

related revenues presently available to the railroads which compete with or connect with the lines of Missouri Pacific and/or Eastern. To afford a measure of protection to such affected railroads, Missouri Pacific has agreed to accept conditions to the Commission's authorization herein, such as usually are imposed upon approval of applications by a railroad to acquire control of another existing railroad. * * * The suggested conditions are similar to those prescribed in *Toledo, P. & W. R. Co. Control,* 295 I.C.C. 523 (541), and cases cited therein. As stated by Missouri Pacific, unless or until otherwise authorized by the Commission, the foregoing conditions would be applicable in situations involving rates established in the future, to the same extent that the existing routes, gateways, junctions, and effective rate structures would be protected from modification or elimination.

* * * * * * * * * *

Supplemental application. Filed as a supplement to Missouri Pacific's application (Finance Docket No. 21755), is the request on behalf of Mississippi River Fuel Corporation for an appropriate order, (a) finding that Mississippi Fuel is not in control of Missouri Pacific; or, upon finding that such control does exist, that Mississippi Fuel not be subjected to regulations under the provisions of section 5(3); and (b) authorizing Misssouri Pacific, through stock ownership, to acquire control of Eastern. The supplement was filed solely to remove any question as to Mississsippi Fuel's being a necessary party to the proceedings herein through its ownership of a substantial proportion of the class A stock of Missouri Pacific. Mississippi Fuel denies that its investment in the stock presumes a desire to exercise control of the railroad. Nevertheless, in the event the Commission's findings so require, the application is to be construed as the fuel company's request for approval and authorization of its acquisition

of indirect control of Eastern commensurate with authorization of direct control thereof by Missouri Pacific.

Mississippi Fuel was incorporated in Delaware in 1928. Its principal business is ownership of a natural gas pipeline for the purchase, gathering, transportation, and sale of gas. Under the Federal Natural Gas Act of 1938, Mississippi Fuel is a "natural gas company", subject to the jurisdiction of the Federal Power Commission. Since 1950, Mississippi Fuel also has engaged in the business of exploring for, producing, and selling natural gas, crude oil, and condensate; and since 1956, its activities have included mining, processing, and selling barite, and the sale of chemicals and other products required in the drilling of oil and gas wells. It is the sole owner of Milwhite Mud Sales Company and [Milwhite Mud] Storage Corporation, and owns 60 percent of the capital stock of Mississippi River Transportation Company, which owns a gas pipeline extending from Clay County, Ill., to the St. Louis area. It purchases gas from another pipeline company and transports such gas to St. Louis for sale to three resale companies. * * *

Mississsippi Fuel's total revenues increased from about $35 million in 1952, to $86 million in 1961, and in the same period its net earnings rose from $5 million to nearly $9 million. Its consolidated balnce sheet of December 31, 1961, reflects the following:

ASSETS

Item	Amount In Millions
Properties (at cost)	$148.4
less accumulated depreciation depletion and amortization	(72.4)
Investment in other assets (at cost)	
Missouri Pacific stock	27.3
Notes receivable, due in 1963-64	4.7
Affiliated companies	2.8
Other	1.1
Current assets:	
Cash	10.8
Accounts receivable	11.7
Note receivable	2.3
Inventories	6.3
Other	0.6
Unamortized debt expense	0.6
Total assets	$144.3

LIABILITIES

Shareholders' equity:	
Common stock, $10 par value	36.4
Capital surplus	5.3
Retained earnings	24.7
Long-term debt:	
First Mortgage pipe line sinking fund bonds	4.3
Sinking fund debentures	54.0
Notes payable to bank, due 1963-64	5.0
Total capitalization	129.7
Current liabilities, excluding $1.1 million long-term debt due in 1962:	
Accounts payable	6.3
Federal income and other taxes	7.6
Other	0.6
Total liabilities	$144.3

A program of diversification undertaken in 1950, resulted in control and absorption of the interests previously described, and in management's decision in 1958 to acquire capital stock of Missouri Pacific. Previous ventures in companies producing nitrogen products and portland cement, considered unsatisfactory, were disposed of in 1959, and the funds from such sales and additional cash from surplus were used to purchase Missouri Pacific stock. Such investments first were made in March 1959 when 11,600 shares of the railroad's class A[8] stock were acquired; and purchases at varying intervals continued. At the end of 1961, Mississippi Fuel owned 605,700 shares of Missouri Pacific stock purchased at a cost of more than $27.3 million. * * * Mississippi Fuel asserts that the purchases were for investment purposes only, and that each transaction was at a price not higher than the prevailing market price. On May 8, 1962, individual holdings of Missouri Pacific stock by five officers and directors of Mississippi Fuel totaled 5,400 shares in addiiton to those owned by the company.

On brief, Mississippi Fuel relates that on September 24, 1962,[9] (after closing of the record herein) it filed with the Securities and Exchange Commission a registration statement with respect to 1,200,000 shares of common stock of Mississippi proposed to be offered by it to the holders of class A capital stock of Missouri Pacific at the rate of one

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[8] Missouri Pacific voting rights are vested solely in its class A and class B issues, of which as of December 31, 1960, 1,871,957 and 40,648 shares, respectively, were issued and outstanding. Dividends on the class A stock are limited to $5 per share in any calendar year, and unlimited on class B after payment of $5 per share to class A. In event of dissolution, class A shareholders are entitled to $100 per share. Class B shareholders are entitled to any further distribution of assets.

[9] On September 26, 1962, Mississippi Fuel owned 661,000 shares of class A stock and 500 shares of class B stock, or approximately 35.12 percent of the voting stock of Missouri Pacific.

and one-third shares of Mississippi Fuel common stock for one share of Missouri Pacific class A capital stock. Mississippi to have no obligation to effect the exchange if less than 900,000 shares of Missouri Pacific class A stock are tendered pursuant to the offer. If accepted as offered, Mississippi Fuel would own shares representing more than 80 percent of the voting capital stock of Missouri Pacific.

Of the persons serving as officers and/or directors of Mississippi Fuel, five also hold corporate positions with Missouri Pacific, and a sixth serves as a director of Eastern. * * *

ILLINOIS CENTRAL PROPOSAL

Description and purpose. Illinois Central has operated continuously since its incorporation in Illinois in 1851. It presently operates approximately 6,500 miles of main and branch lines in 14 midwestern and southern states. Its principal main lines extend from Chicago southwardly via Memphis, (and beyond by two routes) to New Orleans, southwesterly to St. Louis, southeasterly via Mattoon to Evansville, and westwardly to Omaha, Nebr., with side lines to Madison, Wis., Albert Lea, Minn., Sioux Falls, S. Dak., and Sioux City, Iowa. Other primary lines extend from Indianapolis, Ind., to Effingham, Ill.; St. Louis to Carbondale, Ill.; Louisville to Fulton, Ky.; Fulton to Birmingham Ala.; and Meridian, Miss., to Shreveport, La. It owns and operates waterfront facilities at Chicago for interchange of freight between railroad lines and vessels operating on the Great Lakes and the St. Lawrence Seaway, and has similar interchange and bulk-loading facilities at New Orleans. Illinois Central has a direct line serving the Chicago Produce Terminal, owned equally by it and the Atchison, Topeka & Santa Fe Railway (Santa Fe), which is open to deliveries by all railroads serving Chicago.

Illinois Central's lines provide routes and service between Chicago, on the one hand, and, on the other, Eastern's southwestern termini at East St. Louis and Thebes, and its southern terminus at Evansville. Its lines provide service to and from, and extend various distances south and west of the lines of Eastern and the area tributary to that railroad. Traffic is interchanged with Eastern at 11 points served by lines extending in the same general direction, or, intersecting those of Eastern. In addition to the common termini, both railroads provide service at Poseyville and Sullivan, Ind., and Benton, Marion, Pana, Sullivan, and Tuscola, Ill. Between Chicago and Evansville (287.2 miles via Eastern, and 299 miles via Illinois Central lines) the aforesaid direct routes do not include any common points. Each line traverses important intermediate cities and communities not on the line of the other. For example, Eastern serves Chicago Heights, Momence, Watseka, Hoopeston, and Danville, Ill., and Terre Haute, Sullivan, Vincennes, and Princeton, Ind., and Illinois Central serves Kankakee, Gilman, Rantoul (Chanute Field), Tuscola, Mattoon, Janesville, and Newton, Ill., and Stewartsville, Ind. Between Chicago and Evansville, Eastern's line is east of that of Illinois Central, and the optimum distance between the lines in question does not exceed about 50 miles. The two lines are intersected by various lines of other railroads which interchange traffic at the respective junction points with Illinois Central and Eastern.

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By amendment to Finance Docket No. 21892, filed January 25, 1962, Illinois Central seeks authority to acquire sole control of Eastern and its subsidiary companies through ownership of capital stock. Illinois Central has no present ownership in Eastern, but, upon issuance of the Commission's approval would undertake to acquire by purchase whatever capital stock and secuirties would be necessary to effectuate control. By resolution approved Janu-

ary 19, 1962, Illinois Central's board of directors authorized the expenditure of up to $6 million to purchase the stock required to achieve control of Eastern. Illinois Central contends that its control would permit Eastern's restoration to financial good health; would continue its status as an independent railroad; would assure the impartial cooperation of each railroad which interchanges traffic with Eastern; and would protect the competitive power of other railroad in the area served by Eastern.

The application modified by the aforesaid amendment was filed by Illinois Central on December 26, 1961. It had requested authorization for itself, Missouri Pacific, and Dixie Line jointly to acquire control of Eastern and its subsidiary companies through equal stock ownership. Illinois Central had no contract to purchase Eastern's securities, but, as an intervener in the separate applications of Missouri Pacific and Dixie Line, had petitioned to be included in those transactions by imposition of a condition which would require sale of one-third of their respective holdings of Eastern's securities to Illinois Central.

As proposed by Illinois Central, consolidation and joint utilization of certain of its properties, facilities, and operating functions with those of Eastern would be reflected in substantial reductions in Eastern's executive, corporate, treasury, and accounting expenses. Also foreseen are savings in the aggregate cost of providing industrial and agricultural development services, and potential decreases in the costs of maintenance of way and structures, maintenance of equipment, and the supplying of transportation services. Eastern's funds, accounts, and traffic records would be kept entirely separate. The traffic department would be completely independent of any influence by Illinois Central, and matters relating to freight and passenger traffic policies would remain solely in Eastern's control. Eastern's traffic department would initiate future rates and changes as it determines to be appropriate, and Illinois

Central would reserve the right to resist and oppose any such proposals. Bills of lading, waybills, and related freight records would be issued separately by each railroad and would be held in confidence to prevent either railroad from achieving any advantage in soliciting traffic.

Design for operation. * * *

Within the concept that control by Illinois Central would not alter the present independence of Eastern's sales, traffic, services, rates and routes, and related functions, Illinois Central representatives conclude that practicable coordination of operations with Eastern would produce potential annual savings estimated within general categories, as follows:

Operations, mechanical, purchases and stores and related maintenance expenses	$3,033,395
Administrative, corporate, treasury and accounting expenses	1,200,000
Maintenance of way, and general administrative and engineering expenses	142,000
Additional maintenance of way expenses	47,000
Total savings	$4,422,395

More than two-thirds of the annual savings which Illinois Central would be able to generate for the benefit of Eastern contemplates consolidations of properties and combination of the separate operations, the principal projects of which are reported as follows:

Proposed Project	Eastern's present costs	Proposed total costs	Net savings or added income
Chicago Terminal—Freight	$2,247,090	$1,467,614	$ 779,476
Ill Cent Passenger Station—Chicago	1,114,290	951,874	162,416
South Street Freight Station—Chicago	301,005	113,541	187,464
East St. Louis Terminal—Freight	299,355	140,792	158,563
East St. Louis Freight Station	52,147	29,522	22,625
Evansville Terminal—Freight (1)	185,547	137,680	47,867
Evansville Freight Station (1)	47,226	36,569	12,120

Proposed Project	Eastern's present costs	Proposed total costs	Net savings or added income
Operation Poseyville-Evansville line (1)	43,100	22,578	20,522
Southern Illinois coal-fields switchers	115,858	73,244	42,614
West Frankfort Freight Station	33,653	19,291	14,362
Tuscola Freight Station (2)	7,788	—	3,894
Marion Freight Station (2)	8,059	—	4,029
Sullivan Freight Station (2)	6,392	—	3,196
Benton Freight Station (2)	8,147	—	4,074
McClure Freight Station (2)	7,500	—	3,750
General supervision—purchases & stores (3)	268,968	40,345	228,623
Mechanical department net savings	3,787,405	2,625,755	1,337,800
Total net savings or added income to Eastern			$3,033,395

NOTES: (1) Present Ill Cent costs; net savings to Ill Cent; additional income to Eastern re Ill Cent payments.
(2) Wages eliminated at Eastern's stations; savings divided equally by Ill Cent and Eastern.
(3) Wages eliminated re Eastern; payment to Ill Cent; net savings to Eastern.

Because considerable of the operations of Illinois Central and Eastern are centered in the Chicago area, substantial savings would be developed by eliminating duplicative facilities and streamlining joint operations in and near Chicago. Among other savings possible, Illinois Central asserts that the freight facilities at its Markham hump yard, and the passenger facilities included as part of the Twelfth Street Central Station, are more than adequate to handle additional business equivalent to Eastern's total Chicago traffic, and that such operations would be combined. The advantages include the opportunity to terminate Eastern's present operations under trackage rights over lines of its subsidiary, Chicago & Western Indiana Railroad Company (Western Indiana), between Dolton and Chicago (16.87 miles). The freight house operations of Eastern, and its piggyback operations at Chicago would be absorbed by Illinois Central and handled at its South Water Street freight and piggyback yard, thereby eliminating further use of Eastern's separate facilities at West Roosevelt Road and at Canal Street. Also elimi-

nated would be offices and other properties pertaining to the yards in question. Similarly, Illinois Central would coordinate the switching now performed to and from the same connecting railroads, in such manner that Eastern's Yard Center (other than tracks necessary to serve industries) would be abolished, and the Markham yard would be used by both railroads.

At East St. Louis, joint use of Illinois Central's yard would enable Eastern to eliminate its Mitchell yard and move its traffic between Granite City and Illinois Central's hump yard at East St. Louis. That yard has capacity for 3,675 cars, and more than $2 million has been appropriated for installing automatic switching and replacing retarders and other facilities to provide substantial yard improvements. Incidental to this aspect of the proposed coordinations, operation of the freight houses of Illinois Central and Eastern also would be consolidated, and one of the existing freight houses would be eliminated.

* * * * * * * * * *

The proposals of Illinois Central envision operations at Evansville, which in addition to the type of consolidations feasible at Chicago and East St. Louis, would permit abandonment of a portion of Illinois Central's trackage leading to Evansville, and the yards, stations, and terminal facilities at that point. Illinois Central's line to Evansville crosses Eastern's branch line to Mt. Vernon, Ind., at Poseyville, about 18 miles north of Evansville, and between those points there are no stations on Illinois Central's line. For operating convenience, Illinois Central's trains would operate over Eastern's line from Poseyville to Mt. Vernon Junction (Fort Branch), and thence to Eastern's Wansford yard, located northeasterly of Evansville. Such arrangements would permit abandonment of Illinois Central's main line between Poseyville and Evansville, and abolishment of its Harwood yard, located northwesterly of Evansville. The abandoned facilities would include 14.7 miles of

main track, 6.1 miles of yard track, numerous turnouts, and other terminal properties. The traffic of Illinois Central and Eastern would be consolidated for movement over the proposed jointly-used line. In the Evansville area, Eastern would make up and break Illinois Central trains and perform the switching of its cars moving to and from connecting railroads and to and from industries on Illinois Central's tracks. In addition to the estimated savings in operating costs, Illinois Central's engineering department anticipates that maintenance expenses, discussed hereinafter, would be reduced on account of elimination of existing yard and station facilities and abandonment of the Poseyville-Evansville line.

The proposed joint operations into and within Evansville would relieve Illinois Central of a cumbersome operating situation in the handling of traffic (approximately 5 miles) between its Harwood yard and Dixie Line's Howell yard located in the southwestern portion of the city. * * * Interchange traffic of Eastern and Dixie Line is switched between their respective yards over the jointly owned union track, the lines of which extend from Wansford yard in a southerly direction beyond the Belt Line turnout, to a point 1 mile south, and thence westwardly (parallel to the Belt Line) to Howell yard. The union track lines are situated in congested city streets at grade in the business section of Evansville, and are subject to extensive delays in view of local ordinances limiting train lengths to 50 cars each. The union track also serves the Evansville Union Passenger Station, and accommodates the passenger trains of Eastern and Dixie Line.

Illinois Central would eliminate its Harwood yard and would handle Evansville interchange traffic through Eastern's Wansford yard, and over the Belt Line to Dixie Line's Howell yard. While the Belt Line tracks also are situated in city streets, the area in question is subject to less congestion than where the union track is situated. The union

track would continue to be used by Illinois Central to serve industries located thereon. * * * Illinois Central also contemplates that the capacity of the Belt Line would be substantially increased by double tracking about 1,500 feet of the line within the area of the greatest congestion. * * * The double-tracking project would require an expenditure of approximately $300,000. * * *

* * * Illinois Central's control of Eastern would make it feasible to institute new arrangements which would reduce the total number of hours required for operation of mine switch engines; to discontinue Illinois Central's Lake Creek line (10.8 miles) within the area, which would be duplicative of a line of Eastern's; to coordinate the supplying of coal cars separately at the same mines; and to pool the supply of coal cars provided by Illinois Central and Eastern at the mines they serve individually. Further economies would accrue from combining the sales efforts of the respective coal traffic departments. * * *

Other potential savings would develop from combining separate freight stations and freight houses maintained by Eastern and Illinois Central at the same points, and by reducing or eliminating the facilities and forces not required to perform the service required at the consolidated facility * * * the physical properties would be consolidated, some buildings and facilities would be discontinued, and the combined billing work would be transferred to Illinois Central's station at Carbondale where multiple billing machines, are in operation. Similarly, one-man stations, freight houses, and other facilities of Eastern at Tuscola, Marion, and Benton would be absorbed by the existing agency facilities of Illinois Central; and at Sullivan, Ind., and McClure the facilities of Illinois Central would be discontinued.

The proposed modifications in facilities and related changes pertaining to possible Eastern-Illinois Central

coordination each include savings reflected in decreased general supervisory expenses in the form of wages to department heads and supervisors, and economies related to purchases and stores functions. Because the combined operations would be supervised by present Illinois Central personnel with practically no increase in forces, it is proposed to decrease Eastern's staff by elimination of 12 positions, as follows: Vice president-general manager, assistant general manager, assistant to the general manager, chief clerk and the secretary to vice president-general manager, assistant to the superintendent, secretary to the assistant general manager, passenger-car distributor, freight car distributor, rules examiner, police inspector at Chicago, and the captain of police at East St. Louis. In the same manner, combining the purchases and stores operations would permit dispensing with 4 supervisory employees of Eastern at Chicago Heights and 27 at Danville, where are located Eastern's major facilities for repairing maintenance of way equipment, and for providing heavy repairs to locomotives and freight and passenger cars. The proposed consolidation would enable the purchase and stores activities at Danville to be transferred to Illinois Central's major shops of the same type at Champaign pursuant to appropriate contracts with Eastern.

Implementation of the proposals discussed hereinabove would result in appreciable decreases in expenses chargeable to the mechanical departments of Illinois Central and Eastern. Savings estimated to be possible in connection with combining the mechanical services (about $1.3 million), account for about 44 percent of the predicted economies attributable to coordinations of operation, supervision, and maintenance of equipment. * * * The more important of the changes contemplate that Illinois Central would provide necessary maintenance and repair services pertaining to heavy repairs to Eastern's locomotives, freight cars, and passenger cars, at the especially equipped

modern shops located at Paducah, Centralia, and Burnside, respectively.

* * * As a result of the changes, the present mechanical forces of Eastern, approximately 540 employees as of March 15, 1962, would be reduced to about 341.

Under Illinois Central's proposals, Eastern would be charged (a) for its use of various freight facilities and services, a proportionate share of the total operating costs pertaining to each activity based upon the ratio of the use by the separate railroads compared to the combined usage; (b) for passenger train operations at Chicago based upon a per-car charge; (c) for mechanical department services based upon an average of 35 percent of the locomotive shop expenses and 24 percent of the expenses pertaining to the car repair shops. As an additive to compensate for the cost to Illinois Central to augment its facilities and personnel and to provide supervisory and other services, a charge equal to 15 percent of the appropriate user charges would be assessed. The aforesaid apportionments would be added to Eastern's labor charges before computing the 15-percent general charge for use of Illinois Central's facilities. The 15-percent additive would be applied to the operating department general expenses, and to the purchase and stores activities even though no additional employees would be required by Illinois Central.

The net savings in connection with the consolidation of mechanical department efforts give weight to the possible reductions in the cost of direct wages and fringe benefits payable to the affected labor forces, but, fail to consider the cost of any allowance for providing protective conditions to which adversely affected employees would be entitled. Likewise, Illinois Central does not provide for whatever expenditures may be required by Eastern to overcome accumulated deferred maintenance in respect of its locomotive and car equipment. Considering the aggregate

of the potential savings related to the coordination projects, and the contributions by each carrier to the total benefits which would flow therefrom, Illinois Central contends that it is entitled to credit for half the total net savings. Thus, as to each component item, the savings available to Eastern would be matched by net savings of equal amounts inuring to the benefit of Illinois Central.

* * * * * * * * * *

Another broad area of savings associated with the proposal of Illinois Central pertains to possible streamlining of the general expenses of Eastern by combining many of its corporate functions with comparable departments of Illinois Central. * * * Illinois Central proposes to * * * transfer Eastern's accounting and reporting operations to Illinois Central. * * * Illinois Central estimates that the combined accounting work in respect of disbursements, revenues accruing from passenger and freight traffic, car accounting, freight claims, and related machine tabulation work would be performed by Illinois Central at an estimated annual cost to Eastern of about $400,000. * * * All positions in Eastern's accounting department would be abolished.

Illinois Central contemplates further savings in total general expenses by having its executive, corporate, and finance officers perform the same management functions for Eastern in its role as a subsidiary company. Such services could be provided at a charge to Eastern of about $150,000 per year, in addition to the charges for assuming Eastern's accounting functions. * * * providing those services for Eastern would reduce its annual costs by approximately $1.2 million.

Illinois Central contends that its officers and other personnel could serve both companies without prejudice to Eastern's status as an independent railroad having completely separate operations. Despite the general management and fiscal departments of both railroads being headed

by the same individuals, Illinois Central would seek to assure observance of the Commission's accounting regulations. The funds, accounts, and books of the two companies would be maintained separately, and required periodic statements and reports would reveal the effect upon each entity of Illinois Central's exercise of control. Amalgamation of the revenue accounting functions would be developed so that the waybills, bills of lading, and other shipping records of originating, terminating, and interchange traffic of each company would be separate. Each would retain its own traffic executives. Although the same clerical force would handle the primary records pertaining to traffic handled by Eastern and Illinois Central, the joint officers and department heads would have access only to summarizations of such material, and the underlying details would be confidential.

The overall coordination projects also would permit savings pertaining to engineering, and maintenance-of-way supervisory and executive expenses. * * * In time, the less efficient engineering and maintenance plant and practices of Eastern would be replaced. * * * Illinois Central estimates that its proposal would permit annual salary and fringe benefit savings of approximately $142,000. Eastern would continue to have a staff of supervisory and technical personnel below the rank of division engineer, * * * The functions of executive and administrative positions superior to division engineer would be performed * * * by Illinois Central staff members, including some individuals integrated from Eastern's forces, which would be reduced by 18 positions.

Additional savings pertaining to maintenance-of-way work would arise from proposed joint use by both railroads of the modern mechanized equipment owned by Illinois Central, and the related reduced costs of maintenance forces and techniques. * * * Under appropriate contracts, such arrangements would improve Eastern's maintenance pro-

grams, reduce the unit costs of its work, and provide more even year-round utilization of the machinery owned by Illinois Central. * * * The retirement of stations and freight houses not required under the proposed common operations, also would reduce the present maintenance work requirements of Eastern and Illinois Central.

* * * Continuation of the regular maintenance practices of Eastern would be sufficient to assure adequate capacity to support main-line operation of freight trains at average speeds of 60 miles per hour subject to grade and bridge restrictions. * * * With the exception of light weight rails comprising about 16.5 miles of Eastern's line within the Mt. Vernon coal producing district, its trackage is considered in satisfactory condition for the volume of traffic handled. However, the percentage of tie replacements per year would be increased to assure continued safe operating conditions.

* * * Illinois Central's plans to consolidate the properties and combine the operations of itself and Eastern would entail capital expenditures for fixed property and for nonrecurring maintenance projects in the amount of $1.4 million during the first year of Illinois Central control, and $533,000 per year during each of the succeeding 5 years. Additionally, about $200,000 per year expenses are foreseen for miscellaneous additions and betterments to equipment. * * *

Effect on traffic and revenues. The interchange of road-haul carload traffic, exclusive of less-than-carload merchandise cars, between Illinois Central and Eastern, at all junction points ranged from 11,785 cars in 1952 to 5,657 cars in 1961. Summarized in tabular form hereinbelow, are the highest and the lowest total number of carloads interchanged in any year during the 1951-1960 period—showing separately the cars received by Illinois Central from Eastern; those delivered by Illinois Central; the highest and lowest annual total during the same period; and the same

information for 1961, the latest year available for the record, as follows:

	Chicago	E. St. Louis	Evansville	Sullivan	Tuscola
	1951-1960 Inclusive				
Ill. Cent. Received	499/53 171/56	444/58 191/56	1,440/52 626/54	1,652/55 101/52	1,508/52 375/60
Ill. Cent. Delivered	1,458/51 554/60	570/52 188/54	1,119/52 544/60	784/60 112/51	607/51 152/60
Total cars Int'change	1,883/51 813/60	837/59 445/54	2,559/52 1,500/60	1,809/55 218/52	1,860/52 527/60
	1961				
Ill. Cent. Received	293	266	992	109	647
Ill. Cent. Delivered	388	447	747	747	154
Total cars Interchanged	681	713	1,739	856	801

N.B. High total shown on top lines. Number following slant-mark (/) denotes year cited.

* * * * * * * * * *

In addition to the carloads interchanged with Eastern at Evansville, Illinois Central also interchanges considerable freight traffic with Dixie Line for movement to and from points between Evansville and Chicago, and points within and beyond the Chicago area. The total interchange with Dixie Line at Evansville (except merchandise traffic) received by Illinois Central, declined from 27,590 carloads in 1951 to 6,914 carloads in 1961, including fewer than 14,500 cars only in 1954, 1958, and each year after 1958. Of the foregoing, the coal and coke traffic constituted 24,211 cars in 1951, and 3,987 in 1961; and amounted to fewer than 11,000 cars only in 1954 and 1958, and each year thereafter. The carloads of traffic delivered to Dixie Line by Illinois Central totaled 4,092 in 1951, and 4,217 in 1961, and ranged from a high of 4,697 carloads in 1954, to a low of 2,700 cars in 1958.

* * * Under Illinois Central control, Eastern's Evansville line would be operated as the principal service route

between Chicago and Evansville, and wherever feasible, additional traffic would be routed thereover instead of over Illinois Central's present route. However, because its service at the intermediate points would continue to be required, Illinois Central would operate freight trains over its own route between Chicago and Evansville.

Illinois Central's estimates of prospective financial effect upon Eastern's operations, contemplates continued independent operations by Eastern and maintenance of its traffic neutrality with all connecting railroads. The computations assume that the traffic volume and revenue production would continue at 1961 levels of business, and that no traffic would be diverted from other railroads. * * * Accordingly, the projected net income of Eastern under Illinois Central control is shown for each of the first 6 years after acquistion of control, as follows:

First year	$ 217,000
Second year	382,000
Third year	854,000
Fourth year	1,344,000
Fifth year	1,845,000
Sixth year	1,915,000

LOUISVILLE & NASHVILLE
PETITIONS FOR INCLUSION

Motions to dismiss petitions. Concurrent with Dixie Line's petition (filed January 31, 1962) to withdraw its application to acquire sole control of Eastern through stock ownership, were filed separate petitions as intervener in the control applications of Missouri Pacific and Illinois Central. The Commission is requested to provide in any order authorizing acquisition of stock control of Eastern, a condition which would require inclusion of Dixie Line in the approved transaction. Dixie Line desires the successful applicant (a) to cause Eastern to sell at a reasonable price, such rail lines and appurtenances of Eastern as would enable Dixie Line to provide service between

Evansville and Chicago, including intermediate points, and points on branch lines springing from the Eastern main line between Evansville and Chicago, and (b) to cause Eastern to grant trackage and service rights over lines providing access to and from coal mines presently served by Eastern in southern Illinois. As an alternative condition, Dixie Line requests that the successful applicant be required to cause Eastern, on reasonable terms, to grant trackage and service rights between Evansville and Chicago, including intermediate points and points on branch lines. Dixie Line also withdrew its intervention in objection to the granting of the applications of Missouri Pacific and Illinois Central. By order dated February 8, 1962, the Commission, by Commissioner Tuggle, among other things, permitted withdrawal of the application filed by Dixie Line and order its dismissal; cancelled the hearing thereon; and required the hearing in the related matters to proceed as scheduled.

During the course of the hearing, Dixie Line withdrew the request pertaining to the coal field lines, and further defined the extent of the conditions which it anticipates. The first concise refinement of the proposals as modified, is contained in its brief, as follows:

> 1. The successful applicant will, expeditiously, take all reasonable, necessary and appropriate steps to cause the C. & E. I. to sell to the L.&N., at a reasonable price, or (as an interim measure until the accomplishment of the sale) to grant to the L.&N. trackage rights upon reasonable terms over, so much of the C. & E. I. lines of railroad, including appurtenances, as will enable the L.&N. to provide service between Evansville, Indiana, and Chicago, Illinois, including service at intermediate points and on branch lines between those points, not including the line between Danville, and Villa Grove, Illinois, and to bring about approval of the transaction by stockholders and other

security holders of the C. & E. I., involving properties of the latter, as follows:

1. From Evansville to Woodland Junction, sole ownership in the L.&N., with C. & E. I. to have joint terminal privileges at Danville and access to and ownership of the Danville shops;

2. From Woodland Junction to the crossing of the Michigan Central's Joliet line, joint ownership by L.&N. and C. & E. I.;

3. From such crossing to Dolton Junction, joint ownership by L.&N. and C. & E. I., unless the latter is controlled by Illinois Central, in which event, sole ownership by L.&N.;

4. From Dolton Junction to Chicago, a one-half interest in the C. & E. I.'s interest in and use of the facilities of the C. & W. I. and Belt Railway of Chicago;

5. Joint and equal ownership and use of Chicago Heights Terminal & Transfer Railway Company and its facilities.

2. Within thirty days after the effective date of the Commission's order, the successful applicant will notify the Commission and the parties to the proceedings of its election to consummate, or not to consummate, control of the C. & E. I. as authorized by the Commission, subject to the conditions herein set forth.

3. Within sixty days after the effective date of the Commission's order, the L.&N. and the successful applicant will enter into an agreement obligating the successful applicant to carry out its duties described in condition 1 above. The right to determine *bona fide* compliance with this and other conditions is hereby expressly reserved in the Commission.

4. The successful applicant will accept all tenders, received within ninety days after the effective date of the Commission's order, of C. & E. I. capital stock at prices deemed reasonable by the Commission.

5. Without delay, but no later than one year from the effective date of the Commission's order, an agreement will be reached between the L.&N. and the C. & E. I. for the sale of or for trackage rights over (as an interim measure until the accomplishment of the sale) the Evansville line as described in condition 1 above, or for both. In the event the parties to such contract are unable to agree on any of the terms thereof, they will promptly so notify the Commission, with the understanding that the disputed terms will be submitted to the Commission for its determination as a part of the L.&N.'s necessary Section 5(2) application for the acquisition of the line or for trackage and service rights over it, or both.

6. The L.&N. shall sell its interest in the C. & E. I. securities held by The Bank of New York, as trustee, to the successful applicant at such reasonable price or prices as shall be determined by the involved parties and approved by the Commission, or as shall be determined by the Commission in the first instance, such sale to be made on or before the date when a firm agreement is executed for the sale of the Evansville line to the L.&N.

7. The Commission will retain jurisdiction of this matter to make such other and further orders as may be necessary or desirable in the premises.

* * * Dixie Line would willingly sell its holdings of Eastern's securities to the successful applicant herein at a fair price to be negotiated at such time. However, the securities of Eastern, which Dixie Line has trusteed, would not be offered for sale unless it first has assurance of being

able to acquire ownership of, or, the exclusive right to operate over the Evansville line.

Among various considerations presented at the opening of the consolidated hearing herein, counsel for North Western and Illinois Central questioned the right of Dixie Line to present affirmative evidence, or otherwise participate actively in the proceedings. At subsequent stages, Illinois Central filed several petitions seeking dismissal of Dixie Line's petitions and to refuse to permit the petitioner to present evidence. The motions were joined by counsel for owners of certain securities of Eastern, and on behalf of Monon and North Western, railroad interveners. Dixie Line filed replies to the petitions. Among the grounds cited in support of the motions to dismiss, were the following: (1) Absent a properly filed application under section 5(2), the Commission is without jurisdiction to compel trackage rights (except within a terminal), or, to require the purchase, sale, or transfer of a line of railroad; (2) any evidence that Dixie Line's proposal would inure to the benefit of Eastern would contradict the proposal to separate the Evansville line from Eastern's properties and transfer it to Dixie Line; and/or (3) the Commission's authorization and approval is not required for Dixie Line to negotiate with the successful applicant authorized to acquire control of Eastern, and evidence thereon would be irrelevant.

For the reason that Dixie Line's petitions to be included were appropriately filed under the provisions of subparagraph (d) of section 5(2), the aforesaid change in the position of Dixie Line did not unduly broaden the issues involved; and, because consideration of the merits of the proposals therein would be a prerequisite to the Commission's finding whether the petitioner's inclusion would be consistent with the public interest, the examiner overruled the objections. The ruling conforms with the portion of section 1.70 of the Commission's General Rules of Prac-

tice, which defines the authority of the hearing examiner or other officer, and among other things, specifies that * * * An officer shall have no power to decide any motion to dismiss the proceeding or other motion which involves final determination of the merits of the proceeding * * *. Although the examiner's rulings were specific and governed the subsequent conduct of the hearing, no party-applicant or intervener exercised the procedural right to file a special petition to the Commission seeking to overrule and set aside the ruling of the examiner. On brief, the objections are renewed, and the examiner and the Commission are requested to strike the evidence adduced by Dixie Line, and to dismiss the petitions to be included in the application of Missouri Pacific and Illinois Central.

Of the issues raised by the conflicting conclusions of Illinois Central and the interveners which support its position, on the one hand, and on the other, those of Dixie Line; only the arguments as to the Commission's statutory authority are justly determinable without a full disclosure of the evidentiary facts which Dixie Line might properly establish at public hearing to support its proposals. The first of the grounds supporting the motions to dismiss pertains to the procedural rights of the interveners, and thus touches on the jurisdictional problem. The other grounds cited are substantive in nature and require full consideration of the merits of the situation as the basis for a fair determination to grant or deny the relief prayed for by Dixie Line. At such time that it may reach a determination on the merits of Dixie Line's petitions, the Commission would be in position to decide what, if any, conditions it should impose upon the section 5 authorizations that issue in the subject proceedings.

The power of the Commission to prescribe just and reasonable terms and conditions and whatever modifications it finds are consistent with the public interest in awarding approval of consolidation transactions purposed under

section 5(2), is well established by Commission actions and judicial decisions on review thereof. In *N. Y. Central Securities Co.* v. *United States,* 287 U.S. 12 (25), and in *United States* v. *Lowden,* 308 U.S. 225, the Supreme Court defined the term "public interest" and the elements which the Commission is required to consider in making findings on that basis. Since those landmark decisions, a long line of cases consistently have recognized that the Commission may exercise sweeping discretion in making its authorizations contingent upon specific conditions. See *M.&M. Transportation Company* v. *United States,* 128 F. Supp. 296 (298), affirmed at 350 U.S. 857. In effect, unless the conditions specified are accepted and observed in a manner acceptable to the Commission, the requested authorization merits outright denial. Thus, orders approving section 5(2) transactions subject to terms and conditions are permissive and the applicant has the option of exercising the authority as limited. See *New York Central Unification,* 150 I.C.C. 278 (322). Should the applicant reject the conditional authorization, the relief provided at the request of any intervener under the provisions of subparagraph (d) fails to become effective. In prescribing terms and conditions found to be necessary in order to warrant approval of proposed transactions, the Commission has imposed many forms of restrictions, and in several instances has required that segments of other railroads be included in the proposed transaction. See *St. Louis S. W. Ry. Co. Control,* 180 I.C.C. 175 (191). In the latter proceeding the Commission approved the principal control transaction subject to a condition, among others, that the applicant railroad agree to include in the proposal under consideration, acquisition of the lines of another railroad in the affected territory at the commercial value thereof, and/or to assume the operation of the described properties. The order further provided that the record would be held open and the authorization would not become effective until acceptance of the aforesaid condition had been filed with the Com-

mission. In that manner, the Commission reserved the right to determine whether the applicant makes a bona fide attempt to comply with the terms of the condition.

Other contentions as to jurisdiction to afford Dixie Line the relief it requests require consideration. Several counsel query whether Dixie Line is a railroad "in the territory involved in the proposed transaction", as defined in section 5(2), and whether Dixie Line has a statutory right to petition to be included in such transaction. The point is readily disposed by reciting that Eastern and Dixie Line both provide line haul service to and from Evansville; both perform switching services within the terminal area; and both participate in through traffic via routes involving interchange of traffic between their lines. There is no reason to believe that a greater degree of common interest would be required. It is also argued that because Eastern is not a party seeking affirmative relief under section 5(2), the Commission may not, by conditional approval of applications filed by Missouri Pacific or Illinois Central, compel Eastern to act to effecutate any agreement concerning the sale or other disposition of its properties. The powers of the Commission to impose just and reasonable terms and conditions and other modifications found to be consistent with the public interest are exceptionally broad. Decisions pertaining to the effect of section 5(2)(d) warrant the conclusion that the statutory power is precisely as broad in considering proposals of a petitioner to be included in a pending section 5(2) consolidation application, as is applicable in the consideration of transactions proposed by principal applicants. It is clear that appropriate jurisdictional basis exists to warrant consideration by the Commission of the petitions of Dixie Line to be included in whatever transaction proposed by the subject applicants is approved and authorized. The proceedings and the record developed at the hearing herein should not be disturbed.

Description and purpose. Dixie Line operates a total of 5,683.53 miles of line within 13 states[10] throughout the middle and western sections of the South. Its principal main lines extend from Cincinnati to New Orleans via Louisville; Cincinnati to Atlanta; Louisville to St. Louis via Evansville; Evansville to Nashville; Bowling Green (Ky.) to Memphis; and from Paducah to Memphis. Other of its important interchange points include Birmingham, Montgomery, Chattachoochee (Fla.), Knoxville, Jackson (Tenn.), Martin (Tenn.), and Gadsden, Ala. Dixie Line interchanges freight traffic with Eastern at Evansville, Mt. Vernon, Ill., Mt. Vernon, Ind., and East St. Louis, and through passenger trains at Evansville. The lines of Dixie Line and Eastern via Evansville are complementary and provide the shortest routes for traffic between Chicago and points beyond Chicago, on the one hand, and on the other, numerous major points within the Southeast. Historically, large volumes of traffic have moved over the through routes of Dixie Line and Eastern between the North and the South, principally through the connection at Evansville.

* * * * * * * * * *

Dixie Line contemplates that upon consummation of transactions expected to result from the negotiations it desires the Commission to order herein, subsequent authorization would be sought under section 5(2) to purchase or lease the lines and segments described at the outset of the discussion of Dixie Line's petitions. As proposed, it would operate those properties as sole proprietor or lessor, or jointly own such with Eastern, subject to appropriate arrangements for reimbursement by either carrier for work and services performed on its behalf by the other. Dixie Line proposes to perform the necessary train dispatching services; to acquire joint ownership in and have equal representation with Eastern on the board of direc-

[10] Including approximately 38 miles in Indiana and 174 miles in Illinois.

tors of the Chicago Heights Terminal Transfer Railroad, the operations of which would continue under Eastern's direction; and to assume all passenger operations including the passenger service expenses of the Chicago & Western Indiana Railroad at Chicago. For the reason that Eastern's total mileage would be reduced by about half, and proportionately less equipment would be required to operate the remaining lines, Dixie Line contemplates that it would acquire 54 of Eastern's 93 locomotives, of which 10 would be eligible for retirement or replacement and 5 would be sold to help defray the cost. Also, Dixie Line expects to acquire 53.2 percent (about 4,300) of Eastern's freight cars, which would require renewal at the rate of about 150 cars per year to overcome normal wear; and would acquire Eastern's entire fleet of passenger cars and related equipment.

On the assumption that Eastern would agree to dispose of the Evansville line to Dixie Line at a price fair to both parties, Dixie Line believes that the remainder of Eastern's railroad could be operated successfully under the financial control of either Missouri Pacific or Illinois Central; that sale of the Evansville line would provide capital to Eastern which would be available to reduce the fixed and contingent debt structure; and that improved service and the generation of greater volumes of traffic over Eastern's remaining lines would result. Also, because operating costs would be reduced, Eastern would be enabled to recapture some of the traffic heretofore lost to truck-line competitors.

* * * * * * * * * *

The estimated segregation of Eastern's income for 1960 before provision for Federal income tax, indicates that operation of the Evansville line resulted in a net deficit of approximately $2.7 million, and operation of the western lines produced net income in the amount of $2.9 million. Of the losses related to the Evansville line, more than $1.7

million is attributable to Eastern's passenger deficit and $957,000 represents the deficit incurred by freight operations in 1960. The Evansville line's operating result is not surprising because it bears Eastern's entire passenger losses, and consumes about 53.8 percent of its total freight expenses, but contributes only 45.4 percent of the freight revenues. In like manner, other freight operating statistics, divided proportionately between the separated portions, show that the Evansville line is chargeable with 48.5 percent of Eastern's train miles operated, 46.6 percent of its locomotive unit miles, 68.8 percent of yard switch engine assignments, 60.1 percent of station costs, and 53.2 percent of the gross ton-miles operated by Eastern. * * *

Studies of the prospective benefits to Dixie Line and Eastern relate to various savings in which both railroads would participate by consolidation of properties and operations following transfer of the Evansville line to Dixie Line. Estimates of the effect upon the combined income (1960 data) are based upon two presumptions—*first,* that Eastern would remain independent of any other railroad, or, would be controlled by Missouri Pacific; and *second,* that control of Eastern would be by Illinois Central. The calculations differ in light of the fact that if Eastern retains independent status or becomes part of the Missouri Pacific system, Dixie Line and Eastern would be able to arrange for joint ownership and operation of that portion of the Evansville line north of the Michigan Central junction; whereas, if Illinois Central acquires control of Eastern operations over the aforesaid portion by Eastern would be discontinued, and Dixie Line would be obliged to acquire sole ownership and have exclusive use of the line and facilities between the Michigan Central junction and Dolton Junction, about 12.2 miles. The estimates reflect aggregate net results of studies under seven categories shown separately as follows:

	Independent; or Mo. Pac.	Controlled by Ill. Cent.
Consolidate stations & terminals	$ 946,432	$ 596,432
Eliminate duplicative lines	118,764	118,764
Consolidate offices	1,683,329	1,683,329
Effect of improved service on routing of freight by shippers	2,502,297	2,502,297
Effect of adverse routing	(343,014)	(343,014)
Consolidate mechanical depts.	333,743	333,743
Labor protection costs	(17,560)	(17,560)
Total	$5,221,371	$4,871,371

( ) denotes offsetting loss.

* * * * * * * * * *

In the form of adjusted income statements, the studies of the effect upon Dixie Line's operations cover its first 6 years after acquiring the Evansville line in the event Eastern otherwise remains an independent railroad, or if the Missouri Pacific is authorized to acquire control thereof. * * * Dixie Line concludes that the net income which would be produced before the payment of income taxes where applicable, would be $1.9 million deficit during the first year, and net income during the succeeding 5 years in the amounts of $317,000, $1.4 million, $1.8 million, $2.0 million and $2.4 million, respectively.

On the same basis, Eastern's annual pre-tax net income for the 6 years would be $1.8 million deficit during the first year, and net income of $285,000, $1.1 million, $1.5 million, $1.8 million, and $2.0 million during the succeeding 5 years, in order, if Illinois Central should be authorized to acquire control of Eastern.

* * * * * * * * * *

Effect on routes and traffic. The Evansville line, if acquired and operated by Dixie Line, would constitute one of its primary main lines, and form a major railroad route between the Chicago area and points in the Southeast. Evansville would become one of its most important connec-

tions. Consolidation of railroad yards at Evansville would reduce by about 2.5 hours the time for clearing railroad cars through the city, and would relieve traffic congestion. As soon as the proposed operations are commenced, Dixie Line would add local-service trains as a means of freeing scheduled through trains from unnecessary delays enroute. The improved service, among other things, would permit Eastern to recapture interchange traffic lost in recent years as a consequence of its worsening financial condition directly causing increased shortages of ordinary and special freight-car equipment; breaks in schedules; delays in interchange at Evansville, discontinuance of through trains; use of fast trains to perform local freight service; and failure adequately to block cars delivered to Dixie Line. Operation of the Evansville line by Dixie Line would cure or greatly improve the aforesaid deficiencies; reduce damage to lading caused by excessive yard handlings; improve ability to trace cars and shipments; afford additional transit-privilege opportunities to shippers; provide direct facilities to resolve requests for rate adjustments; extend Dixie Line's piggyback service to the Evansville-Chicago route; and provide more expedited turn-around service in the loading and unloading of cars.

In connection with its seeking to acquire the Evansville line including Eastern's industrial lands located adjacent thereto, Dixie Line would expand past efforts to attract industries necessary to generate new traffic for movement by railroad to and from points served by the line. The industrial department of Dixie Line is highly organized, and obviously has a greater capacity than Eastern's comparable department plus its general officers and traffic personnel at field offices, each of whom assist in developmental work. Dixie Line's department has three regional offices in the Southeast, the personnel of which operate nationwide as required. Traffic department forces at local offices in 51 cities throughout the country assist in seeking firms interested in establishing new plants. Extensive advertis-

ing and public relations promotions are constantly sponsored.

* * * * * * * * * *

Dixie Line would be the only railroad providing single-line service via Evansville between the Chicago area and points in the Southeast. Of the principal points served by Dixie Line, Montgomery, Mobile, Birmingham, and New Orleans are afforded single-line railroad service to and from Chicago by the Gulf, Mobile & Ohio Railroad and Birmingham, Memphis, New Orleans, and Gulfport (Miss.) also are served directly by Illinois Central. Heretofore, Dixie Line has been able to compete for traffic to and from Chicago by participating in joint-line service with other railroads, including interchange with Eastern at Evansville. Dixie Line would be able to improve its position by instituting a rescheduled fast-freight train to and from the Chicago area, in addition to Eastern's through train 84, revised schedules of which became effective in December 1961. * * *

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* * * The character of the predominant carload freight moving over Eastern's lines and over the lines of Dixie Line is substantially similar. Generally, the relationship between the principal commodities and revenues derived therefrom to the total carload freight traffic and revenues over the lines of one of the railroads, is comparable to the same ratio for the other. For example, for each of the major commodity groups transported during 1960, the ratios of revenues to the total freight revenues, are shown as follows:

	Eastern	Dixie Line
	Percentages	
Manufactures and miscellaneous	49.4	44.2
Products of mines	34.0	40.2
Products of agriculture	11.2	6.3
Products of forests	2.8	5.6
Totals	97.4	96.3

* * * traffic records for the 5-year period ending December 31, 1960, reflect a general decline in railroad participation (including both Dixie Line and Eastern) in the transportation of the manufactures and miscellaneous group of commodities. By contrast, the movement of such products and the related revenues accruing to Class I common and contract carriers by motor vehicle show substantial increases during the same period. Participation in the transportation of manufactured articles is desired by all types of carriers, because that traffic generally moves under rates higher than other classes of freight and yields revenues better than the average. Obviously, the opportunity for railroads to capture a reasonable portion of the growing volume of manufactured products, depends upon their ability to improve services and offer them at economical prices competitive with those of other forms of carriers. Clearly, Dixie Line's opportunities to share in the manufactures traffic between Chicago industrial centers and port area and the major points in the Southeast would be enhanced if operations over the Evansville line are permitted as proposed in its petitions.

Further in connection with the handling of manufactures and miscellaneous traffic, Dixie Line would attract more business by extending its piggyback service over the Evansville line to and from the Chicago area. Such specialized service was instituted in 1955, and has grown to the point that during 1961, 18,383 trailerloads were handled by Dixie Line, providing revenue in excess of $2.6 million. Of the 1961 piggyback traffic in question, 3,759 trailerloads were interchanged between Eastern and Dixie Line, providing revenues amounting to $377,000, or approximately 14.5 percent of the latter's entire piggyback revenues. In the event Dixie Line commences operations in single-line service via Evansville, existing service disabilities would be corrected, service would improve, and additional piggyback and other railroad freight would be shipped via its lines and routes.

Some portion of the additional traffic which Dixie Line contemplates would be attracted as a consequence of its improved routes and proposed schedules would result from diversion of traffic heretofore handled by other railroads. Certain factors inevitably serve to prevent widespread raiding of traffic amongst railroads, and substantially limits the total traffic susceptible to such influence. Dixie Line's power to divert from other railroads would be subject to various features including the following: (1) Under conditions normally imposed by this Commission in approving transactions under section 5, existing joint routes and channels of trade involving the Evansville line would be maintained without interruption, and competing railroads would have the right and opportunity to continue their participation in joint-line traffic moving to, from, or via the Evansville line; (2) each connecting railroad participating with Eastern and/or Dixie Line in joint-rate routes, would continue to do so, and undoubtedly, would exercise their solicitation powers to retain at least a proportionate share of the available traffic; (3) Dixie Line's other joint-line routes to and from the north via Cincinnati and Louisville gateways, where modern electronic classification yards are or soon would be in existence, in many instances would be superior in terms of service and elapsed time in transit, and traffic thereover would not be disturbed by Dixie Line's operations between Evansville and Chicago; and (4) the ability to achieve diversion of traffic from competing railroads is subject to strict observance of routing instructions by the shipper, and the success of each railroad's competitive attempts to secure patronage of the shippers.

Additional inherent restrictions upon Dixie Line's future power to divert traffic from other railroads would exist in view of there being equally favorable or superior service schedules over competitive routes between the Chicago gateway and points in the Southeast. Available freight routes involving lines of Illinois Central singly or with its

connections, compared to the proposed routes of Dixie Line singly or with its connections, shows the following: Illinois Central routes between Chicago and Memphis, and between Chicago and New Orleans are about 147 and 170 miles shorter, respectively, and afford savings of between 8 and 22 hours on particular schedules; between Chicago and Birmingham an Illinois Central route is some 7 hours faster southbound and about the same as Dixie Line's northbound; and between Chicago and Atlanta and Chicago and Jacksonville (both via Birmingham) the Illinois Central routes would be the same, or near enough alike, to be competitive with the routes proposed by Dixie Line.

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OTHER RAILROAD INTERVENERS

Chicago & North Western Railway—North Western operates in nine states north of and including Illinois and west of Lake Michigan to Wyoming and South Dakota. It serves the principal ports on the west shore of Lake Michigan and on the south shore of Lake Superior. * * * North Western operated about 10,702 miles of railroad[11] in 1961, of which 923 miles are in Illinois. During the 5-year periods 1952-56, and 1957-61, the railway operations resulted in average annual net deficits of $289,000, and $918,000, respectively. The territory tributary to North Western's lines is marked by industrial concentration at the east end, within Illinois, Wisconsin, and eastern Iowa. The remainder of its territory is predominantly agricultural in nature. Because of the geographic situation, its average freight hauls are relatively short. Loss of substantial volumes of agricultural traffic has occurred in recent years as a result of increased use of highway and waterway transportation on the movement of grain and other bulk com-

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[11] Including lines acquired pursuant to *Chicago & N.W. Ry. Co.—Purchase—Minneapolis & St. L. Ry. Co.*, 312 I.C.C. 285, decided October 13, 1960.

modities. North Western operates extensively as a daily commuter-passenger carrier within the Chicago environs.

North Western * * * effects interchange with Missouri Pacific at East St. Louis, and Omaha, Lincoln, and Superior, Nebr.; with Eastern at Chicago; and with Dixie Line at East St. Louis and St. Louis. Within the Chicago switching district there are 21 linehaul railroads including North Western, and 6 switching and terminal railroad companies. Between Chicago and St. Louis-East St. Louis, North Western's route is 318.9 miles in length; and mileages over competitive routes of other railroads are as follows: Eastern—257.1 miles (to Yard Center); Gulf Mobile—266 miles; Wabash—269.9 miles; Illinois Central 270 miles; and Burlington—345.7 miles. In addition, various joint-line Chicago-St. Louis routes are available over combinations of lines of other railroads.

North Western is unequivocally opposed to favorable consideration of the application of Missouri Pacific to acquire control of Eastern, and the petition of Dixie Line to acquire and operate the Evansville line. It would not oppose approval of control of Eastern by Illinois Central if the Commission should find that Eastern's control by a major railroad would be consistent with the public interest. North Western is convinced that the proposals of Missouri Pacific and/or Dixie Line, if effectuated, would directly cause diversion of substantial traffic to Eastern and Missouri Pacific and seriously impair North Western's present ability to render essential transportation service to the public. The St. Louis-East St. Louis interchange produces approximately 7 percent of North Western's total freight revenues. The principal connections are Missouri Pacific and Dixie Line, each of which is responsible for the initial billing of 85 percent or more of the cars they deliver to North Western. * * * North Western fears that considerable of the interchange traffic would be enticed for routing to Chicago via Eastern's lines at the sacrifice of the pres-

ently-used interchange junctions of Thebes and St. Louis-East St. Louis. Additionally, North Western fears that Missouri Pacific-Eastern could route through transcontinental traffic via East St. Louis and Danville, and thus reach eastern connections without movement through the Chicago gateway.

Results of a traffic survey by North Western's sales and service department were presented as estimates of the potential effect of Missouri Pacific control of Eastern upon North Western's interchange traffic via the St. Louis-East St. Louis gateway. Data covering February, May, August, and November 1961, were expanded to represent the portion of the year's traffic which conceivably might be susceptible to diversion. * * * The totals so developed were submitted to responsible traffic personnel for educated judgments as to those of the existing routing patterns which realistically might be disturbed as a consequence of anticipated changes in route and service availability. * * * Comparative studies of North Western's receipts from divisions of the applicable through routes prior to and after the prospective changes, were tabulated by modern computer systems to determine the amounts of revenues lost. The cumulative results, reflecting the potential effect upon North Western's carloading and gross revenues, is expressed according to the extent of the Commission's authorizations of the requests herein, as follows: (A) Missouri Pacific acquiring control of Eastern—42,873 cars totally or partially diverted, resulting in revenue loss of $4,815,156; or, (B) Dixie Line acquiring and/or operating part of Eastern and Missouri Pacific control of the remainder—59,166 cars divertable, resulting in revenue reductions totalling $6,021,283.

North Western's studies are concerned only with the potential adverse effect upon its traffic and gross revenues, and are not equivalent to predictions of additional traffic that would move over Eastern's routes. Determinations

were not made of specific cars in any particular category of traffic that would be diverted; and the divisions of through routes applied are average accruals pertaining to transcontinental traffic to and from points beyond Chicago, based upon representative points within each pair of origin and destination states involved. North Western concedes that greater preciseness would have been obtainable had more time been available following completion of the evidence presented by Missouri Pacific and Dixie Line. On the other hand, only the principal interchange points that would be directly affected were studied; only the major commodity classifications were considered; and certain types of traffic were excluded for various reasons. For instance, evaluation of the St. Louis switching district traffic considered cars moving over North Western's line between Chicago and St. Louis, but, excluded cars interchanged at South Pekin, Peoria, and other intermediate switching points on the line; and, although losses are expected to occur in regard to forwarded cars of agricultural products (5,005 cars), they were not included in the study because of the difficulty of tracing revenues derived from transit tonnage. Considering that the carloads involved in the potential diversions would be of such nature that their loss would result in decreases only of the cost of handling the additional cars on trains that would continue in operation, North Western applies 25 percent of the revenues as being reasonably equivalent to, or higher than, the actual cost of handling the traffic on its lines. Accordingly, North Western asserts that the gross revenue losses would produce annual net losses (based upon 1961 traffic) of (A) $3,611,367 if Missouri Pacific's application is approved as requested, or (B) $4,515,962 if the Dixie Line petition and the Missouri Pacific application are approved.

Monon Railroad.—Monon operates in a southerly direction from Chicago, via Monon, Ind., to Louisville. At Chicago and Louisville, it utilizes belt-line and terminal facili-

ties owned jointly with other railroads. Other principal lines extend from Michigan City, Ind., to Monon, and from Monon to Indianapolis; and branch lines extend from the main line at Wallace Junction to Midland, and from Orleans to French Lick, Ind. ***

Monon considers that its interchange traffic with Dixie Line, except carloads to and from Monon's stations outside the Chicago switching district would be in jeopardy of some diversion by Dixie Line in the event it commences direct-line operations to and from Chicago. Studies of the interchange traffic in question show that Monon would lose approximately 52 percent of the carloads interchanged with Dixie Line, or, 15,223 carloads, which would reduce Monon's gross revenues by more than $1.8 million. Data from regular interline abstracts were studied and related passing reports analyzed, and the interchange carloads were separated into eight categories according to whether Monon or Dixie Line participate as intermediate, originating, or delivering carrier; and whether the stations involved are local to one or the other. In each class, Monon's traffic personnel considered these factors in light of knowledge of the commodities involved, and the usual flow of the affected traffic, and applied personal judgement to determine within which groups changes would be likely to occur, and to what degree. No attempt was made to pinpoint specific carloads affected. Inasmuch as Dixie Line would change from a connection friendly to Monon, to a direct and powerful competitor, Monon concludes that the estimated retention of 48 percent of the existing interchange traffic wih Dixie Line, is conservative and might be substantially understated.

Refutations and Rebuttal

Versus Missouri Pacific application.—The proposals of Missouri Pacific are objected to principally by Illinois Central and North Western on grounds that control of

Eastern would afford Missouri Pacific direct access to Chicago, which it heretofore has not enjoyed. These adversaries contend that railroad service between the Chicago area and the principal points throughout the Southwest is adequate without the addition of other railroads, and that the existing competitive situation should not be interfered with by approval of the requested extension of Missouri Pacific's lines. ***

Illinois Central * * * submits that the studies underlying Missouri Pacific's estimates of divertable traffic fails to identify specific shipments by commodities and points of origin and destination, and thus constitutes conjecture not subject to verification. * * * Missouri Pacific long has had various opportunities to improve the existing scheduled service, but, refused to cooperate with Illinois Central by agreeing to interchange traffic at Gorham (north of Thebes), and by participating with Eastern in routes it suggested via Thebes. Missouri Pacific's rejection of such routes because accession thereto would require surrender of its long haul, according to Illinois Central, perpetuated the necessity to route considerable traffic through the St, Louis area, and to encounter continued terminal delays which otherwise would have been avoided.

North Western asserts that Missouri Pacific grossly understates the potential diversion from connecting railroads. * * *

The criticisms of Illinois Central and North Western are rebutted generally on the basis that each wrongly presumes (1) that Missouri Pacific would be in position to break or subordinate its established normal connections with railroads other than Eastern, and (2) that Missouri Pacific independently would possess unlimited powers to determine and dictate the railroad routing to be designated by shippers whose traffic is handled by Missouri Pacific as one of several participating carriers. Missouri Pacific emphasizes

that its best interests demand that it continue to strengthen the present connections via the St. Louis gateways, because any disruption or deterioration of the established service would needlessly present undue advantages to competing railroads. Nevertheless, it would foster and encourage the routing of traffic over the new route with Eastern via Thebes, for the purpose of making that service competitive with other Southwestern area railroads providing direct service to and from Chicago. Missouri Pacific iterates that the prospective diversion from Illinois Central and North Western from the foregoing diversion of traffic would not exceed $700,000 and $535,000; or, 0.3 percent and 0.2 percent, respectively, of the gross freight revenues of each based upon 1961 levels.

Missouri Pacific considers that North Western's assessment of the effect of diversion of traffic and revenues is unreliably constructed and magnified, particularly because Missouri Pacific's power to influence the routing of traffic over the combined proposed routes is based upon incomplete information; lacks details upon which sound judgments may be founded; utilizes station-agent waybill revenues instead of revised waybill data; uses divisions of through routes based upon averages pertaining to pairs of states, instead of computing divisions based upon specific origin and destination points; and otherwise misuses methods and procedures and misrepresents the results of the studies presented by Missouri Pacific. Additionally, Missouri Pacific asserts that the diversion effects shown in its studies and those of North Western are not comparable because the latter's findings are stated as gross revenues without giving effect to absorbed switching costs which Missouri Pacific would be required to assume. The net effect of North Western's study, as analyzed by Missouri Pacific, is to attribute to the acquisition of control of Eastern and the related coordination of Missouri Pacific-Eastern routes, an ability to divert traffic which North Western

presently enjoys, disregarding Missouri Pacific's present service within the same areas, and its continuing efforts to increase participation in such available traffic. North Western is faulted in not citing valid reasons for believing that the combined routes and service would be endowed with a new ability to change every aspect of Missouri Pacific's present power to compete with North Western and other connecting railroads. Concluding, Missouri Pacific argues that diversions of the magnitude estimated by North Western could not occur in view of conditions to preserve existing gateways and channels of trade which the Commission would impose in the exercise of its discretion under the circumstances herein.

Versus Illinois Central application.—The objectives of Illinois Central, and the bases for its projections of benefits to Eastern are attacked primarily by Missouri Pacific, Dixie Line, and counsel for minority owners of Eastern's securities. Illinois Central's position is considered as purely defensive in order to counter its fears that the other proposals inevitably would produce invasion of Illinois Central territory. The opposition asserts that the proposed control would suppress Eastern's ability to compete against Illinois Central between points they both serve, and eliminate Eastern as an effective competitor. In proof are cited, among other things, that the economies foreseen would occur almost entirely through retrenchment of Eastern's facilities and services; that Eastern would be relegated to the status of a local-carrier adjunct of Illinois Central; that Eastern's operations as a bridge carrier participating in transcontinental traffic would diminish or disappear; that Illinois Central would prefer and protect its own interests where conflicts with Eastern's interests arise; that any perceivable benefits would be derived from disemployment of Eastern's personnel by resort to abandonment of properties and/or consolidation of functions into departments of Illinois Central; and that no new

traffic and revenues would be generated inure to Eastern's advantage.

Those opposed to Illinois Central's design, assert that the preservation of Eastern as an existing railroad would be jeopardized on grounds that Illinois Central wrongly construes the application of Missouri Pacific and the petitions of Dixie Line as tantamount to requests for authority to construct new lines of railroad, or, to extend existing lines into territory presently served by Illinois Central. The manner in which Illinois Central proposes to consolidate general offices, and the accounting, traffic sales, transportation, and operating departments, are criticized as being more beneficial to Illinois Central than to Eastern or its financial position. * * *

Dixie Line centers its criticism upon Illinois Central's intention to retain and operate the Evansville line, which competes directly with the line of Illinois Central between Chicago and Evansville. Dixie Line fears that because the interests of the parent and its proposed subsidiary would be directly opposed, Illinois Central necessarily would favor continued utilization of its available long-haul single-line routes as its predominant service route. The effect would be to cause substantial reduction in use of existing Eastern-Dixie Line combination routes to and from points in the Southeast and to and from connections with other railroads reaching the South and Southeast. Dixie Line concludes that such a situation would be inimical to Eastern's interests and to those of the public generally.

Dixie Line and the minority owners of securities of Eastern separately assert that Illinois Central's estimates of the effect of its control proposal upon Eastern's net income and financial position are unreliable for the reason that the underlying studies are premised upon insufficient data and inaccurate conclusions. Alleged inadequacies pertain to the failure to apportion properly the charges against Eastern

for work to be performed on its behalf, and for related use of Illinois Central's tracks and other facilities; the application of the 15-percent user charge additive instead of fair allocations of the value of the facilities and the relative use thereof by the owner and the user companies; and the absence of charges either to Illinois Central or Eastern for repayment of the cost of providing statutory protection to carrier employees who would be affected adversely by the proposed transaction. Dixie Line further argues that Illinois Central envisions unifications and consolidations which may not be undertaken as adjuncts of control by stock ownership or otherwise. Further, many advantages cited by Illinois Central could be achieved only in situations of merger, because in exercising control, the subordinated company must be protected against any disadvantages that might appear in the event independent status is reestablished in the future. Among the interests to be so protected are the rights of minority security owners to enjoy fair and equitable arrangements and to have the competitive status of the companies in question continued without change; the maintenance of separate corporate organizations so that arms' length negotiations may be realistically conducted; the continuation of separate accounts; and the assurance that changes in physical properties would not impede the controlled company's existence as a separate entity. The failure of Illinois Central to distinguish between the characteristics of control and merger, and other optimistic appraisals of the potential situation, are asserted to have resulted in overstatements of the savings and other benefits.

Versus Louisville & Nashville petitions.—* * *, each of the railroads and the minority security owners participating in the proceedings herein, object to favorable consideration of the petitions of Dixie Line to be included in the acquisition of control of Eastern. The seeking of affirmative relief by imposition of conditions upon whichever applicant

under section 5(2) is successful herein, is opposed as an evasion of the Commission's requirements pertaining to the filing of applications to be so authorized. Also, the content of the conditions suggested by Dixie Line is criticized as seeking primarily to prevent any railroad from acquiring control of Eastern unless Dixie Line first acquires the Evansville line at a price and under terms which Dixie Line would be in position to dictate. Those opposed to Dixie Line's position assert that the suggested arrangement would be cumbersome and unworkable; would result in dismemberment of Eastern's lines; would serve only to forestall the providing of needed financial aid to Eastern; would eliminate prospects for profitable operations; and would cause serious depression of the value of Eastern's properties, and reflect adversely upon the value of its securities. To remove Dixie Line's power to injure Eastern by impeding the acquisition of control according to the Commission's decision, several parties request that Dixie Line be required to divest itself of the securities of Eastern which were purchased by the voting trustee designated by Dixie Line.

Missouri Pacific reiterates that it is willing to acquire and operate all of Eastern's lines, and asserts it would be able to improve car supply and service on the Evansville line and provide funds required to improve passenger service and restore it to attractive first-class service. The Evansville line would not be neglected, and Missouri Pacific would not permit the line to deteriorate physically or otherwise. It does not support the requests to dismember Eastern's lines; but, in the event appropriate separate proceedings are instituted on the basis of agreements as to a just price and other elements of mutual concern, Missouri Pacific would support the sale or lease of the Evansville line. In the view of Missouri Pacific, after it acquires control of Eastern, whether or not arrangements are worked

out with Dixie Line, the latter's investment in Eastern's securities would be sound in character.

Illinois Central objects to Dixie Line acquiring the Evansville line without benefit of an application proceeding, and to its being enabled to institute new single-line service to and from Chicago, because such would be tantamount to extending the lines of Dixie Line without regard to the public interest. It fears that such developments would permit invasion of Illinois Central's service territory and cause diversion of traffic sufficient to jeopardize its ability to continue operations. Illinois Central believes that the proposed inclusion in the control of Eastern would redound to Dixie Line's benefit, but, would not improve Eastern's traffic and revenue prospects. Considering the Missouri Pacific and Dixie Line proposals as a package, Illinois Central concludes that approval thereof would result in nothing more than increasing railroad service to and from Chicago.

The minority owners of securities of Eastern, by examination of Dixie Line's principal witnesses, and by counter studies prepared by Eastern's director of management research and planning, criticizes Dixie Line's conclusions * * *. Counsel argues that the Commission is without jurisdiction to impose the requested conditions upon Eastern, it directors, or, its security owners, inasmuch as Eastern is not a party applicant, and the requiring of compliance with any terms and conditions would not be associated with an authorization issued to Eastern. In his opinion, Dixie Line failed to prove that it would be consistent with the public interest to impose a condition requiring prior negotiation of an agreement of sale or lease of the Evansville line. Counsel argues that Dixie Line should have presented adequate evidence to establish the reasonable value of the properties and rights in question. Absent such evidence, he concludes that the Commission may not deter-

mine that Dixie Line should be included as a prerequisite to authorizing either applicant to acquire control of Eastern.

Anticipating that the proposed operation of the Evansville line by Dixie Line would be the proximate cause of diversion of traffic and loss of revenue in the amount of at least $1.2 million annually, North Western opposes the petitions. * * * North Western alleges that * * * estimates are understated, and in fact, fail to include considerable traffic which several witnesses for Dixie Line indicated would be diverted from existing railroad routes. The predicted diversion of about $200,000 revenue from North Western, is asserted to be based upon conjecture and should be discarded. North Western also argues that the type of changes in routes and service suggested by Dixie Line could be effectively accomplished by voluntary coordination of schedules and combination of duplicative facilities, without need for approval of any acquisition of control of Eastern, and without change in ownership and operation of the Evansville line.

Many of the foregoing arguments against Dixie Line's petitions and in favor of dismissal thereof are joined in by Monon. It fears that operation of the Evansville line by Dixie Line would cause diversion of traffic and $1.8 million loss of revenues, and ultimately would weaken Monon's financial position and require it to curtail service, which would cause even greater losses of traffic and continuing operating deficits. Monon asserts that the advantage projected by Dixie Line are illusory; that the inordinate expenditures to rehabilitate the Evansville line * * * are disproved by evidence of record; and that * * * Eastern incurs only a small deficit in the operation of that line. Monon's view is that operation of the Evansville line by Eastern, whether controlled fiancially by Missouri Pacific or Illinois Central, can be continued without establishing new competitive conditions involving the Evansville line, under

which Monon would be unable to protect itself from the loss of a substantial fraction of its operating revenues.

* * * Dixie Line contends that the conditions requested in its petitions may lawfully be imposed upon approval of the acquisition of either control application herein, because without specifically requiring separation of the Evansville line, the transaction under consideration would not be consistent with the public interest. It concedes, however, that implementation of the condition requested would depend upon subsequent authorization of the sale of, or exclusive operating rights over the Evansville line pursuant to an appropriate separate application to be tried on its own merits. Dixie Line argues that a condition which would require Missouri Pacific or Illinois Central to negotiate for the sale or lease of the Evansville line, as any other condition prescribed by the Commission, would be subject to the successful applicant's decision whether to exercise the authorization, and being permissive, would not constitute an unavoidable mandate. In the opinion of Dixie Line, the procedures which it supports herein would not be the cause of any excessive delay in consummation of the acquisition of control of Eastern, and, unless operation of the Evansville line is separated from the remainder of its properties, Eastern would remain a weak railroad unable to prevent annual operating deficits.

In rebuttal to evidence purporting to support the objections against its proposals, Dixie Line presented evidence to dispute the criticisms and adverse conclusions discussed hereinabove. Pertaining to fears expressed by North Western that the potential diversion of traffic would cause revenue losses sufficient to impede its ability to continue carrier operations, Dixie Line construes the evidence as showing that North Western would retain a considerable portion of the traffic it shows would be lost, particularly as its participation in Eastern interchange traffic to a large extent, involves service as the originating or terminating railroad. Also stressed is that any diversion of traffic

presently routed via East St. Louis to routing via Chicago area gateways would be subject to considerable offsets because North Western would have a corresponding power to divert other traffic against Dixie Line's interests. Further, Dixie Line urges that it would be required to incur added costs if it should encourage the changing of present interchange points from East St. Louis to the Chicago gateways. Monon's estimates of traffic and revenue losses are considered overstated for the reason that Dixie Line and Monon presently are competing for traffic moving via Louisville to and from the Chicago area, and the proposed changes by virtue of operation of the Evansville line would not vest Dixie Line with advantages not heretofore exploited as fully as possible. Monon also is said to possess another competitive advantage inasmuch as its rates provide absorption of switching costs in both directions on Dixie Line interchange at Louisville.

Effect Upon Employees

Missouri Pacific contemplates that the following approval of its acquisition of control of Eastern, newly available single-line service and improved combined operations would attract more business than heretofore has been handled by Missouri Pacific and Eastern in joint-line service. Considered in its entirety, additional employment opportunities would be created and no employee would be adversely affected. Although of the total savings contemplated, about $257,000 would relate to savings in labor costs, those employees who would be displaced could be absorbed elsewhere at no disadvantage. Nevertheless, in the event the prospective coordination projects cause the reduction of jobs available on either railroad, the affected employees would have entitlement to the protection provided under the terms of the Washington Job Protection Agreement of May 21, 1936, to which both railroads are signatories. Missouri Pacific recognizes, of course, that the

Commission may prescribe employee protective conditions broader in coverage than those contained in the aforesaid job agreement.

Incidental to the proposed control by Illinois Central and the related coordination of routes and operating services and potential abandonment of duplicative facilities and functions, numerous employees would be displaced or otherwise disturbed in their present situations. Practically every proposed change in operations involves some decrease in the labor forces of Illinois Central or Eastern, or both. Most of Eastern's higher echelon management positions; its supervisory positions above the rank of Division engineers; and its accounting department jobs would be eliminated as part of Illinois Central's plans. In some instances, Illinois Central forces would be increased to absorb the additional work pertaining to Eastern's activities. Among other consequences of Illinois Central's proposals, Eastern's accounting department would be affected by the loss of 122 positions, and additional positions related to the administrative, and corporate and treasury departments also would be abolished; and Eastern's mechanical department forces (based upon March 15, 1962 records) would be reduced by approximately 199 positions, arising from the consolidation of numerous yards, terminals, and shops of Illinois Central and Eastern, and the transfer of certain major yard operations of Eastern to Illinois Central yard facilities within the Chicago area. The expectation is, that the effect upon employees would be gradual, and that vacancies occurring because of normal attrition would supply positions for practically all the persons deprived of employment because of the control arrangement.

The general chairman of the general committee of adjustments, Brotherhood of Locomotive Engineers, representing its members employed by Missouri Pacific; his counterpart representing Eastern's engineers; and a spokesman for the general chairman of the Brotherhood

of Locomotive Firemen and Enginemen, representing firemen employed by Eastern, each testified and supported favorable consideration of Missouri Pacific's application and proposals. * * * Following appraisal of the Missouri Pacific proposals and of the initial application for control filed by Dixie Line, the employees in question were convinced that although certain aspects of coordinating services would result in job losses, the Missouri Pacific proposal, as a whole, would attract considerable traffic to move over the new combined routes, and new job opportunities would be created. Because the Missouri Pacific proposition presents better prospects than Illinois Central, which would cause considerable disemployment on Eastern's properties and would prevent the Missouri Pacific plan from being effectuated, the witnesses oppose favorable consideration of the Illinois Central requests.

* * * the Railway Labor Executives' Association (Labor), intervened in opposition to the applications of Missouri Pacific and Illinois Central, and against the petitions of Dixie Line to be included in whichever transaction is approved. * * * and presented a witness to describe the worsening predicament of railroad employees generally. The brief contains no evaluation or discussion of the merits of either application, with or without the inclusion of Dixie Line; offers no comparisons of the applications and their relative impact upon the public interest; and makes no request for specific findings as to the effect upon employees. Labor reiterates that each of the proposals under consideration should be denied, and argues that the evidence of record conclusively shows that the denials are required.

* * * Labor directs its concern upon the imposition of fair and equitable protective conditions, which, in its opinion, the Commission should prescribe in the event one or the other of the applications is approved. In addition to the minimum type of conditions conforming with the re-

quirements of the second sentence of section 5(2)(f),[12] Labor argues that the situation prevailing herein requires the imposition of the "attrition" conditions which were voluntarily assumed by the Norfolk & Western Railway Company in *Norfolk & W. Ry. Co. Merger*, 307 I.C.C. 401, involving merger of the Virginian Railway Company, and in the pending proceeding involving the proposed merger of Norfolk & Western and the New York, Chicago & St. Louis Railroad Company, and related transactions, Finance Dockets Nos. 21510, et al. Alleging that the applicants each assert there would be relatively little adverse effect upon employees. Labor contends that the attrition conditions would have no adverse financial effect upon either applicant, but, would have a tremendously beneficial effect upon employee morale, and thus inure to the railroads' benefit.

CONCLUSIONS AND RECOMMENDATIONS

* * * Many of the evaluations discussed hereinabove, and the estimates and predictions drawn therefrom, at least in part, are founded upon disputed judgment factors which as validly could be supplanted by other points of view, the acceptance of which would alter the resulting conclusions in some respects. Most of the projections, predictions, and estimates presented by the applicants and the petitioner are attacked by one or more of the others, and by other parties herein. The contradicting studies, in turn, are at-

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[12] In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employees pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order.

tacked by the sponsor of the questioned studies. Generally, the studies supporting the position of each principal party are based upon acceptable premises and warrant finding that the criticisms are of limited validity. In this connection, each party and intervener acknowledges that the projects in question could have been further refined and made more comprehensive had there been additional time and resources available. In no instance is the basic study or counterstudy successfully discredited to the point that its rejection would be the only just solution.

It is not essential that the Commission accept as entirely accurate the forecasts of the future effect of any of the principal proposals, or, the criticisms thereof. Each necessarily is constructed upon some degree of conjecture and the exercise of personal judgments. For purpose of disposition of the requests herein, there is sufficient validity to each basic study and conclusion to be accorded full consideration in the determination herein. Suggested adjustments, if considered in light of offsets which probably would apply if other reasonable bases for recalculations are accepted, would be of minor consequence. Even if some of the conclusions should involve variations as much as 25 percent in either direction, the changes would not unavoidably require a contrary decision founded upon the record.

Practically every principal party in the proceedings herein predicates its individual interests upon convictions that Eastern's financial position is precariously weak, and that immediate substantial assistance is imperative to protect its ability to provide adequate transportation service. * * * Eastern is convinced that its salvation rests in future affiliation with a major railroad system, but, believes that the transactions under consideration do not merit approval, unless adequately modified, for the reason that in contrast to what would be inherent in a merger situation, the control proposals do not safeguard the rights of owners of junior-lien securities which confer no voice in management

and provide payment of interest only in years actually earned.

Eastern suffers inherent handicaps because of high terminal expenses, short road hauls, and special problems due to a large proportion of its operations being within areas of heavy congestion. Since 1953, its earnings have declined because of decreasing traffic levels, growing costs of labor, and increased competition from railroads and other modes of transportation. Late in 1961, Eastern recovered some traffic volume by inaugurating a new fast-scheduled freight train and changing the pattern of routing coal originating at mines it serves. Such measures appear to have favorably affected Eastern's recent operating results, and its general financial complexion promises to become more satisfactory. In view of these developments and other aspects, Eastern believes its operations as an independent railroad could be continued, if in the course of events, decisions favorable to railroads generally, and to Eastern's position particularly, are handed down to various pending proceedings pertaining to possible changes in rates and divisions, work rules, local tax adjustments, and issues in other litigation in which Eastern is directly or indirectly concerned.

Approval and authorization of either application herein and consideration of the petitions to be included therein, must be in accordance with the intent of the provisions of paragraph (2) and subparagraphs of section 5. The ultimate determination to be made by the Commission is that, subject to such terms and conditions and modifications which it may find to be just and reasonable, the transactions proposed by the applicants would be consistent with the public interest. The statute requires the Commission to give consideration to certain elements affecting the public interest, as follows: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include other railroads in the territory involved

in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected. In administering these provisions, the Commission must be guided by considerations for adequacy of transportation service, essential conditions of economy and efficiency, and appropriate provision and best use of transportation facilities. *New York Central Securities Corp.* v. *United States,* 287 U.S. 12 (25), *McLean Trucking Co.* v. *United States,* 321 U.S. 67 (82).

In deciding whether a proposed transaction is consistent with the public interest, consideration must be given to the public directly affected by the proposed changes in transportation service, and the effect upon every segment of the total public. Where a part of the public would benefit by the proposed transaction and other parts would be injured, the question is whether the benefits outweigh the injuries. Where the evidence as to the alleged benefits and injuries is conflicting, and neither the benefits nor the injuries are clearly established, the question is whether the probable benefits overbalance the probable injuries. *Chicago, B. & Q. R. Co. Control,* 271 I.C.C. 63 (146). As in all determinations within the jurisdiction of the Commission, the ultimate decision must be compatable with the standards declared by the Congress to be the National Transportation Policy, enacted September 18, 1940, as the preamble of the Interstate Commerce Act, as amended.

Numerous specific contentions by the applicants, the petitioner, and the interveners, not separately discussed in the report herein are embraced in related topics covering broader areas of consideration. Conclusions and requested findings not consistent with those discussed herein have been carefully examined in light of the entire record and found to be without material significance or not justified. Requests by certain interveners for conditions affecting future rights pertaining to Eastern's securities, and complaints questioning the legality of some of the stock pur-

chase transactions are beyond the reach of these proceedings for lack of jurisdiction, or, because of remoteness and insufficient materiality. The interested parties generally have the right to institute appropriate actions at law in the nature of stockholders' derivative suits. No further separate review of the requested conditions or the complaints of record is required.

Applications to acquire control. On its individual merits, without regard to the other proceedings consolidated herein, Missouri Pacific's acquisition of control of Eastern would enable it to organize and direct broad areas of improvement involving Eastern's financial status, and the streamlining of its physical plant and transportation operations. Undoubtedly, the arrangement would insure Eastern's greater earning power, expanded roadhaul, switching, and terminal services, and increased participation in vital transcontinental traffic moving via the Chicago gateway. Coincidentally, Missouri Pacific and its subsidiary railroads would secure direct-line routes to and from Chicago, and would be afforded direct connection with major railroads presently not reached by Missouri Pacific system lines. Considerable new traffic would inure to both railroads.

The expected traffic advantage to Eastern and Missouri Pacific would result largely from diversion to the new routes and improved service of many carloads of freight which they individually do not presently handle, or, in which their respective participation is relatively minor. * * * Of course, if the ability of any railroad or railroad system is seriously threatened, and as a consequence, their present routes and services are reduced or eliminated, the overall disadvantages to the shipping public from such injuries might more than overbalance the advantages realizable from the assistance to Eastern's financial and operational position.

Of the elements which together govern the evaluating of the proposal by Missouri Pacific, the fact that Eastern is

* * * in need of financial assistance, and Missouri Pacific is in position to render such aid, is of primary persuasive force. The propriety of considering the critical financial position of the railroad proposed to be controlled in the disposition of applications under section 5(2), was affirmed in *Missouri Pacific R. Co.* v. *United States,* 4 Fed. Supp. 449 (458); upon judicial review of this Commission's decision in *St. Louis S. W. Ry. Co. Control,* 180 I.C.C. 175, and the principal has been adhered to consistently. See *Pennsylvania R. Co.—Control—Lehigh Valley R. Co.,* 317 I.C.C. 139. The anticipated operating and other improvements which would result from control by Missouri Pacific would increase Eastern's capacity to compete with other railroads within the Chicago area and between Chicago and the other points served by Eastern. * * * Such developments would result in better transportation service to the public. Eastern's greater gross revenues which the new traffic would generate, and the net earnings therefrom, would be available to apply toward the reduction of the outstanding indebtedness, and otherwise to bolster Eastern's financial condition.

* * * control of Eastern * * * would permit Missouri Pacific, for the first time, to operate direct line service to and from Chicago. Obviously, this would increase its present power to compete with major railroads which heretofore have operated direct lines to, from, and via the Chicago gateway area. * * * There is wide disparity in the projections of the carloads and revenues that actually would be influenced by the new routes. Naturally enough, the separate studies of each disputant supports its own position most favorably. Nevertheless, it is obvious that concentrated efforts by Missouri Pacific and its subsidiaries to attract every conceivable ton of traffic to the Eastern route might generate considerable more diversion than is acknowledged in the record. On the other hand, Illinois Central and North Western are satisfied that the proposal

would not develop all the advantages foreseen by Missouri Pacific and Eastern, and that increased efforts by the competing railroads to improve their respective schedules and services could frustrate some of the force of the adverse effect. Other defensive and retaliatory methods of retaining present traffic, or capturing new traffic are available, particularly to whichever competing railroad originates or delivers the susceptible traffic at the shippers' plants. Of course, determination of the proceedings herein does not require certain knowledge of the effect of the potential diversion which Missouri Pacific and Eastern might accomplish. See *Spokane International R. Co. Control,* 295 I.C.C. 425 (436).

The impact of the Missouri Pacific-Eastern direct routes upon other railroads participating in the movement of local and transcontinental traffic to and from the Southwest and the West via Chicago, would be further cushioned by the imposition of appropriate "gateway" conditions. * * * Together, the conditions provide that the advantages which the new routes create, are not restricted exclusively for the benefit of Missouri Pacific and Eastern. The normal power of retaliation amongst railroads for unjustifiable diversion of traffic, and the effect of the special gateway conditions warranted herein, provide ample protection of the traffic rights of the affected railroads. The record in no wise supports a conclusion that as a consequence of the aforesaid new competition, the traffic of Illinois Central, North Western, or any other railroad would so drastically shrink that any of their number would be unable to continue the satisfactory common carrier operations they now perform.

Discussion in detail is not required in support of conclusions that pursuant to section 5(2), it would be consistent with the public interest and considerations of national transportation policy, to embrace in the approval and authorization of Missouri Pacific's acquisition of control through stock ownership of Eastern, the railroad carriers

subsidiary to or affiliated with Eastern. The record substantiates that such approvals would be consistent with the public interest and are inseparable from the primary acquisition under consideration, and the facts warrant favorable action upon the entire package of railroad ownership rights.

As previously stated herein, Missouri Pacific also would institute coordinated rail-truck, piggy-back and substituted truck-for-rail service by combining the motor carrier multistate operating rights of its subsidiary truck company (MC-89723 and related subs) with the authority issued to Eastern (MC-57688), covering interstate operations solely within Illinois. Arrangements of that nature, no doubt, would enable the greatest advantage to be derived from the operating rights in question, and however achievable, would not effect any substantial change in the existing competitive situation. However, the operating rights of Eastern are pursuant to the second proviso of subparagraph (a) of section 206 of the act, which confers an exemption upon persons engaging in the transportation of interstate or foreign commerce by motor vehicles solely within a single state, without the necessity of first having been issued a certificate of public convenience and necessity, or a permit, by this Commission. Being an exemption to a remedial statute, the provision is strictly construed. See *McDonald* v. *Thompson,* 305 U.S. 263, and *Spokane & I. E. R. Co.* v. *United States,* 241 U.S. 344. Under the circumstances herein, by operation of law, the motor carrier rights under MC-57688 would cease to be effective upon consummation of the control recommended for authorization herein. Of course, Eastern could apply for an appropriate certificate authorizing operations pursuant to section 207, covering the rights now held under the second proviso filings. Such rights, issued in the name of Eastern, or in the name of a subsidiary company, would be free of any limitations regarding single-state operations and lawfully could be coordinated with the operating rights held by Missouri Pacific

Truck lines. Nothing herein is to be construed as prejudging any subsequently filed motor carrier application.

The Missouri Pacific proposals to control Eastern would result in practically no adverse effect upon employees of either railroad. However, in the event the new combined operations, coordination of facilities, and integration of train schedules and services should cause injury to the interests of carrier employees affected by the authorization recommended herein, the conditions which are prescribed in *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 317 I.C.C. 557, would provide adequate and reasonable beneficial protection.

The application of Mississippi Fuel for authority to acquire indirect control of Eastern by virtue of ownership of capital stock of Missouri Pacific also merits approval. The company is not a carrier subject to the jurisdiction of this Commission, but for some time actually has directed and controlled Missouri Pacific's management through common directors and appointment of executive officers. It acquired for investment purposes a large fraction of Missouri Pacific's voting capital stock; is its largest stockowner; and has extended offers to acquire not less than 80 per cent of the total shares outstanding. Mississippi Fuel and Missouri Pacific have several officers and directors in common, and a director of Eastern since 1942, became a director of Mississippi Fuel in 1950, and continues to serve both companies. As a person not a carrier subject to the provisions of the Interstate Commerce Act, Mississippi Fuel required no authorization to acquire control of the existing Missouri Pacific system. See *Louisville & J. B. & R. Co. Merger,* 290 I.C.C. 725 (733), and 295 I.C.C. 11.

The joining of Mississippi Fuel, by virtue of its supplement to the application of Missouri Pacific conforms with the requirements of section 5(2), and is consistent with the decision of the Supreme Court in *United States* v. *Marshall*

Transport Co., 322 U.S. 31, holding that the person in control of a carrier subject to the act, is a necessary party in proceedings for approval of acquisitions of the properties of other such carriers. The only argument by interveners herein against Mississippi Fuel's request is that the interests of a natural gas company are so competitively conflicting with the interests of a coal-hauling railroad, that the two could not be compatible, and the subservient company necessarily would suffer. The reasoning fails because Mississippi Fuel, which operates pipe lines for the tranportation of gas and oil is not a common carrier, and does not compete with Eastern's transportation services. Whatever advantages or disadvantages there may be to consumers of coal compared to users of oil and gas as fuel, would neither be enhanced nor depreciated as a consequence of a change in the corporate status of Eastern. * * *

The proposal of Illinois Central contemplates no increase in traffic by diversion from other railroads. It relies primarily upon forms of consolidation and elimination of portions or all of Eastern's administrative, executive, and accounting activities, and joint use of Illinois Central's corresponding facilities. Where advantageous, yards, terminals, and portions of line would be abandoned, new facilities would be constructed, and existing trackage-rights operations would be modified. The only area in which Eastern's policy independence would be retained, would be within its traffic and sales department. Illinois Central would make funds available to Eastern as required, and would charge on the basis of unit costs plus a percentage additive for services it performs for Eastern. The net savings affected by the consolidations and changed operations would be divided equally between Eastern and Illinois Central.

Implementation of Illinois Central's proposal would eliminate Eastern as an effective competing railroad, and

would prevent the acquisition of control of Eastern by Missouri Pacific, Dixie Line, or any other connecting railroad that might be enabled to provide new routes to and from Chicago. Illinois Central would be placed in position to favor routes over its own lines in derogation of routes involving Eastern's lines. *** The suggested coordination projects would entail removal of a considerable fraction of Eastern's physical plant and reduction in its work forces. Thus, Eastern's operating capabilities would be restricted to the point that in the event control by Illinois Central is voluntarily or otherwise terminated in the future, it would not be practicable to reestablish Eastern as an independent operating railroad.

The relative merits of the aforesaid applications must be considered in light of the prospective long-term welfare of Eastern, and the effect of the control arrangement upon the essential interests of shippers directly or indirectly dependent upon Eastern's continued existence. In those terms, it would be appropriate to approve Missouri Pacific's proposal, subject to terms, conditions and modifications specially designed to accord reasonable protection to the immediate interests of other railroads. On the other hand, the proposals of Illinois Central are not suitable under the circumstances and such could be favorably regarded only in the event Eastern were in imminent danger of final collapse and complete disintegration as an operating railroad. Of course, it would be unrealistic to deny approval of both applications based upon the nebulous aspirations of Eastern's management that the outcome of a series of decisions not within its control, would provide adequate self aid without the surrender of Eastern's corporate independence.

Investigation of stock acquisitions. The investigation ordered by the Commission pertains to the separate purchases of Eastern's securities by Missouri Pacific, and by

the Bank of New York as trustees for Dixie Line. The order does not refer to the acquisition of Missouri Pacific stock by Mississippi Fuel, and the latter is not named a respondent. Consideration of that situation is not required in these proceedings. As ordered, the inquiry shall seek to determine whether any or each of the purchases of Eastern's securities may have resulted in acquisition of control of Eastern in violation of section 5(4), and if so, to require measures necessary to prevent continuation of such violations. All the material facts pertaining to acquisition of the securities by the principal parties are detailed hereinabove, and need not be recited again or reviewed at this point.

Missouri Pacific since 1959, and Dixie Line since 1960, have actively given consideration to possible unification of Eastern with their own systems, and each had knowledge of the other's interests. Each initially studied the advantages of merger and eventually terminated such proposition; and each thereafter explored the feasibility of other forms of consolidation with Eastern. Obviously, before either purchased any of the securities of Eastern, Missouri Pacific and Dixie Line both realized that attainment of the other's objectives would thwart any affiliation of Eastern with their own companies. The record demonstrates that Dixie Line's purchases, after Missouri Pacific's purchase of a sizeable block thereof, was for the purpose of establishing a voice of interest in the disposition of Eastern's status. Although both profess that the purchases were for purposes of investment, the expectancy of a return is conceded to be contingent upon authorization from the Commission, and subsequent power to induce changes in Eastern's policies and practices.

In light of the disclosures of record, the Commission's Bureau of Inquiry and Compliance, on brief, concludes that Missouri Pacific and Dixie Line, separately, or in

concert with the trustees [13] they individually appointed to hold legal title and the voting rights pertaining to Eastern's capital stock and other securities, each acquired control of Eastern without authority of the Commission and in violation of section 5(4); and that the violations are continuing. The Bureau suggests that the violators be ordered to take appropriate steps to terminate the conditions of unlawful control. In their respective briefs, Missouri Pacific and Dixie Line each defend their purchases and deny that such actions, or, any subsequent actions on their part, constitute unlawful acquisition or exercise of control of Eastern. They insist that at no time did they act in concert with each other regarding their interests in Eastern's ownership. ***

Similar allegations of unlawfully acquired control or power to control Eastern are pressed on brief by Illinois Central in regard to Missouri Pacific and Dixie Line separately, and jointly in view of their combined power to control or manage Eastern in a common interest. Illinois Central suggests they be required to divest themselves of their respective ownership interests as a means of permitting Illinois Central to acquire control of Eastern, following authorization by the Commission to do so. Counsel for certain minority owners of Eastern's securities also requests that divestiture by Dixie Line be required because continued ownership constitutes an effective power to block Missouri Pacific's exercise of control and management of Eastern, and would prevent any future related proposals to seek authority to merge or effectuate other forms of unification of Missouri Pacific and Eastern.

The violation herein, if any, necessarily involves reaching the conclusion that without authority under section

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[13] Reference hereinafter to ownership of Eastern's securities by Missouri Pacific or Dixie Line, where applicable, also includes reference to The Marine Midland Trust Company of New York, and The Bank of New York, respectively.

5(2) of the act, Missouri Pacific and Dixie Line *** achieved control as defined in section 5(5), by virtue of separate purchases of capital stock and other securities of Eastern. Basic in consideration of such charges is the fact that the purchase of capital stock of one carrier by another, of itself, is not prohibited or otherwise restricted by the provisions of section 5. Whether or not control exists following purchase of capital stock is an issue of fact to be determined, not by artificial tests, but by the special circumstances in each case. See *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125. In the same context, in *New York, C. & St. L. R. Co. Control,* 295 I.C.C. 131 (155), the Commission asserted that while section 5(4) to (7), inclusive, and section 1(3)(b) indicate the broad outline of the type of transaction sought to be prohibited, or prohibited unless approved by the Commission; it is left to the latter to judge for itself, based on the record, whether the facts warrant a conclusion that the transaction in question, having regard for the actualities of intercorporate relationships, will give a carrier power to exercise control or to participate in accomplishing or effectuating control of another carrier contrary to the act. The Commission also has held that the law aims at the acquisition of controlling power and does not await an actual demonstration of such power. *United States Freight Co.—Investigation of Control,* 39 M.C.C. 623. Such control or power to control, however, must be real and not based on conjecture or remote possibilities. *New York, C. & St. L. R. Co. Control,* 295 I.C.C. 703 (714).

The record is clear that Missouri Pacific has had and continues to nurture a real intention to control Eastern's management through stock ownership, and its application is proof of its desire to serve that purpose by having the Commission authorize the requested acquisition of control. Also, until several months after Missouri Pacific filed the application herein, Dixie Line, by its own application, sought to acquire authority to exercise stock control of

Eastern. Each separately took precautions to avoid any actions which might indicate that control already had been acquired, or that the power to control Eastern had been removed from the owners who theretofore held and exercised corporate and managerial control. While the substantial minority ownerships held by Missouri Pacific and Dixie Line constitutes them the two largest single owners of Eastern's voting stock, neither has overtly or otherwise attempted to take advantage of their minority rights. The Commission has held that minority stock interest, even when coupled with minority participation, is neither control nor the power to control. *McCormick—Control—A.C.E. Transp. Inc.*, 80 M.C.C. 401(411), which involved 40 percent stock ownership and participation as one of the directors on the board. On the other hand, the Commission has recognized control to exist with ownership of less than 10 percent of the outstanding voting stock, *Louisville & J. B. & R. Co. Merger, supra,* at pages 727 and 741. See also *United States* v. *Union Pacific R.R. Co.*, 226 U.S. 61 (95).

Immediately after Missouri Pacific purchased the Hammack block of Eastern's securities, Eastern and other interested railroads were openly notified that an application to acquire control of Eastern would be filed with the Commission. *** The filing of the application marked Missouri Pacific's acknowledgement that any effort to control Eastern or to create the power to control its management or practices without the requisite authorization would be unlawful and inimical to the best interests of Missouri Pacific. This is particularly persuasive for the reason that about 10 days after the purchase by Missouri Pacific, Dixie Line acquired substantial ownership of Eastern's securities, which a few days earlier Missouri Pacific had refused to purchase. Further, Dixie Line filed a comparable application about 10 days following Missouri Pacific's application to acquire control of Eastern.

Another principal basis for alleging unlawful control by Missouri Pacific is premised upon its ownership of almost one-third of the total outstanding class A preferred stock of Eastern. The charter provisions provide that owners of two-thirds of the class A stock, as a class, must consent to any consolidation, merger, sale, lease, exchange, or other disposition of Eastern's properties and assets, and to any modification of charter provisions affecting the rights of such stock. Several interveners charge that Missouri Pacific possesses a form of negative control over Eastern sufficient to prevent approval of any future transactions involving its properties, which might not be agreeable to Missouri Pacific.

STATUTORY FINDINGS AND ORDER

In reaching the hereinafter determinations, consideration and weight have been accorded to primary elements affecting the public interest, described in section 5(2)(c) as follows: (1) the effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the specific proposals to be included in the transactions under consideration, and the inclusion or failure to include other railroads in the territory involved in the proposed transactions; (3) the total fixed charged resulting from the proposed transaction; and (4) the interest of the carrier employees affected;

APPENDIX B

TRAFFIC CONDITIONS

1. Under the control of Missouri Pacific, Eastern shall maintain and keep open all routes and channels of trade via existing junctions and gateways, unless and until we authorize otherwise.

2. The present neutrality of handling traffic inbound and outbound and in overhead service by Eastern shall be continued so as to permit equal opportunity for service to and from all lines reaching the rails of Eastern without discrimination in the arrangement of schedules or otherwise.

3. The present traffic and operating relationships existing between Eastern, on the one hand, and on the other, all lines connecting with its tracks, shall be continued insofar as such matters are within the control of Missouri Pacific.

4. Eastern shall accept, handle, and deliver all cars inbound and outbound and in overhead service, loaded and empty, without discrimination in promptness or frequency of service as between cars destined to or received from competing carriers and irrespective of destination or route of movement.

5. Missouri Pacific shall not do anything to restrain or curtail the right of industries located on Eastern to route traffic over any or all existing routes and gateways.

6. Missouri Pacific shall refrain from closing any existing route or channel of trade with any carrier on account of its control of Eastern unless and until we so authorize.

7. Any party or person having interest in the subject matter may at any future time make application for such modification of the above-stated conditions, or any of them, as may be required in the public interest, and we will retain jurisdiction to reopen the proceedings herein in our own motion for the same purpose.

APPENDIX C

The portions of Eastern's Evansville line to be considered in the negotiations for the acquisition by Dixie Line and the nature and extent of the contemplated conveyance are as follows:

1. From Evansville to Woodland Junction, sole ownership in the Dixie Line, with Eastern to have joint terminal privileges at Danville and access to and ownership of the Danville shops;

2. From Woodland Junction to Dolton Junction, joint and equal ownership by Dixie Line and Eastern;

3. From Dolton Junction to Chicago, Dixie Line to have a one-half interest in Eastern's interest in and use of the facilities of the Chicago & Western Indiana and Belt Railway of Chicago;

4. Eastern and Dixie Line to have joint and equal ownership and use of Chicago Heights Terminal & Transfer Railway Company and its facilities.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 16th day of February, A.D. 1964.

Finance Docket No. 21755
MISSOURI PACIFIC RAILROAD COMPANY—CONTROL—
CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

Finance Docket No. 21892
ILLINOIS CENTRAL RAILROAD COMPANY—CONTROL—
CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

Finance Docket No. 21980
CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY—
INVESTIGATION OF CONTROL

Investigation of the matters and things involved in these proceedings having been made, and said division, on the

date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report, and the report of the hearing examiner, are hereby referred to and made a part hereof:

It is ordered, That, in Finance Docket No. 21755, acquisition by the Missouri Pacific Railroad Company and through that carrier, by the Mississippi River Fuel Corporation, of control of the Chicago & Eastern Illinois Railroad Company and the latter's subsidiary and affiliated companies by the ownership and purchase of capital stock upon the terms and conditions in said report found just and reasonable be, and it is hereby, approved and authorized;

It is further ordered, That, in Finance Docket No. 21755, the applications of the Illinois Central Railroad Company and the Illinois Central Industries, Inc., to acquire control of the Chicago & Eastern Illinois Railroad Company and the latter's subsidiary and affiliated companies through the purchase of capital stock, be, and it is hereby, denied;

It is further ordered, That, in Finance Docket No. 21980, the investigation be, and it is hereby, discontinued.

It is further ordered, That if the authority herein granted in Finance Docket No. 21755 is exercised, the Missouri Pacific Railroad Company shall submit for the consideration of this Commission two copies of the journal entries required to record the transaction and shall within 5 days following the consummation of the transaction notify, in writing, all parties to these proceedings and this Commission of the actual date of such consummation;

It is further ordered, That the Mississippi River Fuel Corporation shall, on and after the date of consummation of the transaction authorized in Finance Docket No. 21755, be subject to part I of the Interstate Commerce Act to the extent of filing such special reports as may from time to time be required;

It is further ordered, That the jurisdiction of this Commission be, and it is hereby, retained for the purpose of making such further order or orders herein as may be necessary or appropriate with respect to the inclusion of the Louisville and Nashville Railroad Company in the transaction approved in Finance Docket No. 21755; the common carrier status of the Mississippi River Fuel Corporation; and for any other reason found necessary and appropriate; and

It is further ordered, That this order shall take effect and be in force from and after 35 days from the date of its service and that if the authority granted in Finance Docket No. 21755, is not exercised within 120 days from said effective date, this order, except as to the discontinuance of the investigation in Finance Docket No. 21980, shall be of no further force or effect.

By the Commission.

BERTHA F. ARMES,
Acting Secretary.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

Nos. 687, 688, 689

ILLINOIS CENTRAL RAILROAD COMPANY,
MONON RAILROAD,
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, - - - - - - - - Appellants,

versus

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
ET AL., - - - - - - - - - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

MOTION TO AFFIRM AND BRIEF IN SUPPORT OF THE MOTION.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

Nos. 687, 688, 689

ILLINOIS CENTRAL RAILROAD COMPANY,
MONON RAILROAD,
ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, - - - - - - *Appellants,*

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

MOTION TO AFFIRM AND BRIEF IN SUPPORT OF THE MOTION.

I.

THE MOTION.

Appellee, Louisville and Nashville Railroad Company (L&N), pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment of the district court be affirmed on the ground that the questions are so unsubstantial as not to warrant further argument.

II.

BRIEF IN SUPPORT OF THE MOTION.

STATEMENT.

The jurisdictional statements of the Illinois Central Railroad Company and the St. Louis Southwestern Railway Company present no question attacking the district court's opinion as it relates directly to the conditions for compulsory negotiations between the L&N and Chicago & Eastern Illinois Railroad Company (C&EI) in contemplation of the sale of the C&EI's line between Evansville, Indiana, and Chicago, Illinois, to the L&N. Only the Monon Railroad (Monon) raises any question regarding such conditions. Therefore, this brief will be directed to the questions and arguments in the jurisdictional statement of the Monon. L&N respectfully adopts the arguments, as fully as had they been presented herein, of the other appellees directed to the jurisdictional statements of the Illinois Central Railroad Company and the St. Louis Southwestern Railway Company.

In its report and order, the Commission authorized stock control of the C&EI by the Missouri Pacific Railroad Company (MoPac), subject to certain conditions, including those calling for compulsory negotiations between the L&N and C&EI for the possible sale of the Evansville line to the L&N. Such compulsory negotiation conditions (reproduced in Appendix A) were imposed, as the district court properly held (App.

25a), pursuant to the provisions of Section 5(2)(d) of the Interstate Commerce Act [49 U.S.C.A. 5(2)(d)].[1] The L&N invoked the jurisdiction of the Commission when it timely filed its petitions for inclusion in each of the two applications for control of the C&EI.

In providing for compulsory negotiations regarding sale of the Evansville line, the Commission was guided by this Court's criteria of public interest set forth in *N. Y. Central Securities Co.* v. *U. S.*, 287 U. S. 12, 25, wherein this Court held:

> "the term 'public interest' . . . has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities. . . ."

In line with these standards and upon the convincing record before it, the Commission was compelled to find ultimately that "[w]e would be derelict in our responsibility to serve the public interest if, in the face of this record, we failed to provide [L&N] an opportunity to acquire the Evansville line" (App. 57a).

The record established, and the Commission found, that the Evansville line and the L&N lines constituted one of the major rail arteries between the north and

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[1]Section 5(2)(d) provides as follows:

"The Commission shall have authority in the case of a proposed transaction under this paragraph [(2)] involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest."

the south, providing the shortest route between Chicago and many points in the southeast and handling, for many years, great volumes of traffic (App. 58a). By acquiring the Evansville line, the L&N would establish a major, first class, single-line rail route between Chicago and the southeast to be accomplished by installing heavy-duty rail, rebuilding bridges and otherwise rehabilitating the physical plant, improvements which C&EI could not undertake because of its financial limitations (App. 58a). In addition the L&N would consolidate facilities and functions, eliminating congestion and delay (App. 58a), provide its large, modern and varied supply of rolling stock to shippers on the Evansville line and bring "to bear upon the entire single-line operation an efficient program for operating repair shops and terminals, for handling cars and trains, for maintenance operations, for administration functions and for customer service" (App. 58a-59a).

An important consideration in the Commission's deliberations were the facts that the Evansville line in 1960 was operated at a net loss of $2.7 million (App. 67a) and that the Evansville line did not logically fit into the MoPac system (App. 65a), whereas that line is ideally suited to be a part of the L&N system (see Appendix B attached). Under Missouri Pacific control, the Evansville line would be a dangling appendage, burdened with the same inherent disadvantages as those which attend the present operation, the latter of which the C&EI's President recited on the record (Exhibit H-127, Statement BE).

It is little wonder, therefore, that the L&N's proposal was so enthusiastically supported by the public, including the Governors of the States of Indiana, Kentucky, Tennessee and Alabama, other public officials and many shippers having a direct interest in rail service via the Evansville line.

None of these findings by the Commission, all of which were supported by solid and virtually unchallenged evidence, have been, nor could they properly be, questioned during the course of judicial review.

Only the limited issue of whether the Commission gave adequate consideration to the competitive effects on the Monon is attacked. As will be shown herein, the Commission did give adequate consideration and did make adequate findings with regard to the Monon. Accordingly, a "rational basis" exists for the imposition of the compulsory-negotiation conditions, and the final judgment of the court below should be affirmed. *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, 286-287.

ARGUMENT.

I. The Commission Made Adequate Findings With Regard to the Competitive Effects on the Monon.

The Monon's position during the course of judicial review has been that the Commission ignored the Monon's testimony of traffic diversion and that if the Commission had adequately considered such testimony, it, perforce, would not have imposed the compulsory-negotiation conditions.

Responding to that contention it should initially be noted that in the portion of the examiner's recommended report which the Commission adopted in its own report, under the heading "Monon Railroad," the Commission considers and discusses the very testimony which Monon claims the Commission ignored (App. 165a-166a). At those pages, Monon's diversion study is considered in detail, showing how the study was made, how Monon analyzed its statistics, and how many carloads of traffic and how much gross revenue were allegedly to be diverted by L&N. Elsewhere in the Commission's report (App. 174a and 175a) the Monon's alleged diversions are further discussed, and the criticism by the L&N of Monon's alleged diversion are summarized (App. 175a and 176a). From these portions of the Commission's report, it is clear that Monon's testimony was not ignored. And further proof that consideration was given to that, and other, diversion estimates is found in the report when the Commission held (App. 63a):

> "While the testimony of these supporting witnesses demonstrates a public concern for the preservation, improvement and expansion of rail service on routes in which [L&N] participates, a concern which, no doubt, could be allayed and satisfied by the institution of [L&N's] proposal; another concern of some gravity is in evidence and demands like attention, namely that of opposing railroads apprehensive of their own traffic in the face of the prospective intensification of competition."

Thus, the issue is whether the Commission made adequate basic findings when it held (App. 65a):

> ". . . [W]e do not believe [L&N] could, by its operations of the Chicago-Evansville line, so prevail over the railroads opposing its plan as to impair or significantly affect their ability to compete or maintain the standard of service to which shippers have become accustomed."

Traffic diversion estimates, based on past experience, do not necessarily form a proper basis for future projections. They assume that all traffic patterns and volumes are static. They are based on a past period of time under circumstances then existing and are presumed to apply in future years when different conditions will doubtless exist. With respect to the Monon's estimate, it does not take into account such factor as that the study period was 1961, when the railroads' share of intercity traffic and the level of economic activity were lower than in recent years. The unreliability of diversion estimates as a guide to the future was passed upon by the Commission in *Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co.*, 317 I.C.C. 261, wherein it held (p. 282):

> "We have found from our past experience in similar proceedings that the diversion of traffic in the volume predicted rarely, if ever, occurs."

An issue similar to the one raised by the Monon was decided in *Broth. of Maint. of Way Employees* v. *United States*, 221 F. Supp. 19 (1963), affd. *per curiam*

375 U. S. 216. This was an action brought to set aside the Commission's order approving the acquisition of stock control of the B&O by the C&O. On the point which Monon here raises, the Court held (p. 25):

> "It is the contention of the plaintiffs here, however, that the Commission's finding that 'no undue amount of traffic will be diverted from Central' is inadequate. They contend that it should have made a specific determination as to how much traffic would be diverted from Central. We cannot agree. The Commission was not required to engage in speculation and guesswork to come up with a precise percentage prediction."

Rather than base its ultimate findings on the conflicting diversion estimates of Monon and L&N—which at best are sheer guesswork of future circumstances—the Commission, in support of its imposition of the compulsory negotiation provisions, understandably chose to base the finding of no adverse effect upon other railroads on established facts of record, which "would come into play to prevent a serious or abrupt dislocation of the present competitive balance" (App. 64a).

Those facts which the Commission termed "countervailing factors" (App. 64a) and on which the Commission made specific findings, are:

> (1) "On joint-line routes to and from Chicago via the Cincinnati and *Louisville*[1] gateways—where modern, electronic classification yards are

[1]Only the Monon, of those opposing the L&N before the Commission, interchanges traffic with the L&N at Louisville which is competitive with the L&N-Evansville line route.

in operation—there are service advantages which would preclude the diversion of traffic to the Evansville line (App., p. 64a)." [Emhasis added].

(2) "[L&N] would be subject to routing instructions of Shippers (App., p. 64a)."[1]

(3) [L&N would be subject to] "retaliatory action by other railroads upon which it depends for important interchange traffic (App., p. 64a)."

(4) [L&N would be subject] "to the traffic conditions we would impose to keep open the existing gateways and channels of commerce (App., p. 64a)."

(5) ". . . during the past decade the 5-State area of the southeast served by [L&N] and its connections—Alabama, Florida, Georgia, Kentucky and Tennessee—has experienced a higher rate of population and industrial growth than other sections of our country." And in view of that finding the Commission went on to hold "[t]o the extent [L&N] might attract a portion of the new traffic being generated by the area's growth or recapture traffic previously diverted to other modes of carriage, the success of its operation would have no deleterious effect upon other railroads, but, instead, would contribute to their well-being, at least as to [L&N] rail connections . . . . (App., pp. 63a-64a)."

All of these five findings have substantial factual support in the record. Thus, facts and not estimates were the basis of the Commission's finding that no carrier would be significantly affected in its ability to compete.

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[1]The evidence before the Commission establishes that shippers route 95 percent of all traffic (Tr. 1535).

Accordingly, if the conditions in the Commissioner's report and order had authorized the acquisition of the Evansville line by the L&N (once MoPac acquires control of the C&EI), the evidence of record and the findings of Commission would have fully provided the requisite "rational basis" for such conditions insofar as the competitive consequences of acquisition are concerned, and the Court will not substitute its judgment on this issue for that of the Commission. *McLean Trucking Co.* v. *U. S.*, 321 U. S. 67, 87-88. The Commission's order, however, went no farther than to require compulsory negotiations for such acquisition; L&N still must file its own Section 5(2) application for authority to acquire the Evansville line, when an agreement of sale is reached or, if no agreement is reached, within one year following the effective date of the Commission's order here being reviewed (App., p. 68a).[1]

[1]The Monon's contention that L&N can commence temporary operations on the Evansville line without further Commission action (J.S., p. 9) is without merit. The Commission's report and order does not contemplate nor provide for any operation, temporary or permanent, prior to further authorization by the Commission upon L&N's later Section 5(2) application, and L&N states to this Court, as it did to the district court through the affidavit of its President, that it has no intention to seek any temporary rights.

II. The Conditions for Compulsory Negotiations Are Not To Be Judged by Antitrust Standards.

There are three decisions of this Court interpreting Section 5(11) of the Interstate Commerce Act,[1] which clearly and consistently hold that the Commission is not to judge carrier consolidations by the standards of the antitrust laws. The first is the *McLean* case, *supra,* wherein this Court held (321 U. S. 67, 84-85):

> ". . . [T]here can be little doubt that the Commission is not to measure proposals for all-rail or all-motor consolidations by the standards of the anti-trust laws . . . [a]nd in authorizing those consolidations [Congress] did not import the general policies of the anti-trust laws as a measure of their permissibility."

Further, this Court held (p. 86):

> ". . . [T]he Commission is not bound, as appellants urge, to accede to the policies of the anti-trust laws so completely that only where 'inadequate' transportation facilities are sought to be made 'adequate' by consolidation can their dictates be overborne by 'the public interest.' That view, in effect, would require the Commission to

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[1]Section 5(11) [49 U.S.C.A. 5(11)] reads in pertinent part as follows:

> "The authority conferred by this section shall be exclusive and plenary, . . . and any carriers . . . participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission . . ."

> permit only those consolidations which would not offend the anti-trust laws. As has been said, this would render meaningless the exemption [of Section 5(11)] relieving the participants in a properly approved merger of the requirements of those laws, and would ignore the fact that the Motor Carrier Act is to be administered with an eye to affirmatively improving transportation facilities, not merely to preserving existing arrangements or competitive practices."

The second case is *Minneapolis & St. Louis R. Co.* v. *U. S.*, 361 U. S. 173, wherein this Court in reaffirming its decision in *McLean* held (p. 187):

> "Even though such acquisitions might otherwise violate the antitrust laws, Congress has authorized the Commission to approve them, if it finds they are in the public interest."

And the most recent pronouncement of this Court reaffirming its decisions in *McLean* and *Minneapolis* is *Seaboard Air Line R. Co.* v. *U. S.*, 382 U. S. 154, 156-157, wherein this Court said:

> ". . . It matters not that the merger might otherwise violate the antitrust laws; the Commission has been authorized by the Congress to approve the merger of railroads if it makes adequate findings in accordance with the criteria quoted above that such a merger would be 'consistent with the public interest.' 54 Stat. 906, 49 U.S.C. §5(2)(b) (1964 ed.)."

The competitive effect of L&N acquisition of the Evansville line is, of course, a factor for the Commis-

sion to consider in evaluating whether the proposal is consistent with the public interest. As we have established in the preceding section of this brief, the Commission did give such consideration in finding ultimately that the public interest criteria supporting L&N acquisition required imposition of the compulsory-negotiation conditions.

III. The Court Should Not Prejudge What Action the Commission Will, or Should, Take When L&N Files Its Subsequent Section 5(2) Application.

What is here being judicially reviewed is the report and order of the Commission which authorized control of the C&EI by the Missouri Pacific, subject to the conditions *subsequent* calling for compulsory negotiations between the C&EI and the L&N.[1] In other words, the four corners of the Commission's report and order *here being reviewed* are to be examined to determine if there is warrant for the imposition of such conditions, and, as we have shown, the facts of record and the Commission's findings fully support its action. Contrary to the position of the Monon, the Court is not at this time, or in this proceeding, to be called upon to anticipate what further action the Commission will take when L&N files its Section 5(2) application for acquisition of the Evansville line. As the Commission's power is "exclusive and plenary" [Section

[1]Monon improperly characterizes the conditions as being precedent (J.S., p. 9). In fact, the conditions have no vitality unless and until MoPac acquires control of the C&EI (please see Appendix A).

5(11)], these are matters for the Commission to decide in the exercise of its broad discretionary powers when the L&N later files its application. Then, it may be that the Monon itself will be involved in a merger proceeding resulting in a total breakdown in its opposition to the L&N's application. Conceivable, the L&N may consider the price for the Evansville line to be set by the Commission[1] to be excessive, and so not elect to acquire the line. Or, the conditions which the Commission attaches to its later order authorizing L&N acquisition of the Evansville line may be totally acceptable to the Monon. Any of these circumstances, and likely others, could alter or eliminate the course of Monon's opposition at the time when the Commission issues its later order.

Section 5(2)(b) authorizes the Commission to grant a further hearing if the public interest so requires. This discretion is reposed solely in the Commission, and if the Commission, when it issues its order authorizing L&N acquisition of the Evansville line, abuses that discretion, or if Monon otherwise feels aggreived by such order, it then can attack that order, raising whatever issues it regards as appropriate.

But, we respectfully submit, the Court should not in this case presume to decide that the Commission will deprive the Monon, or anyone else, of fair and adequate consideration when L&N later files its Section 5(2) application. What is here being reviewed is the

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[1]In the event C&EI and L&N fail to reach an accord the Commission is to set the price for the line (App., p. 68a).

rational basis for the Commission's action in proceedings already held and not those to be held at a later time. And the rational basis for the compulsory-negotiation conditions clearly exists.

CONCLUSION.

The facts of record before the Commission fully support its preliminary and ultimate findings that the public interest requires imposition of those conditions of compulsory negotiations looking toward L&N's acquisition of the Evansville line. The Monon's argument that the Commission virtually ignored the Monon's contention of competitive disadvantage is, in essence, an allegation that the Commission should have accepted Monon's traffic diversion estimates at face value, and so it is asking the Court to substitute its judgment for the Commission's on this issue. This the Court will not do. *McLean Trucking Co.* v. *U. S.*, 321 U. S. 67, 87-88.

Although the record and the Commission's findings on competitive consequences would have supported a grant of authority to acquire the Evansville line, such grant must await further application from the L&N and later order of the Commission. Then, it may be that circumstances will have altered so as to eliminate Monon opposition. In any event, the extent of further proceedings with regard to L&N acquisition is a matter of Commission discretion which, if later abused, will provide Monon with adequate opportunity for judicial review.

We respectfully submit, therefore, that the appellants present no substantial question for the decision of this Court, and that the judgment and decree of the court below should be affirmed.

Respectfully submitted,

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APPENDIX A.

CONDITIONS IN THE COMMISSION'S REPORT (APPELLANT APPENDIX, pp. 67a-68a) RELATIVE TO L&N ACQUISITION OF THE EVANSVILLE LINE.

1. "Missouri Pacific, if it assumes control of Eastern,* shall immediately thereupon . . . take all reasonable, necessary and appropriate steps to cause Eastern to negotiate in good faith for the sale to Dixie Line,* of so much of Eastern's line of railroad, including branches, appurtenances and facilities as is set out in Appendix C hereto, so that Dixie Line would be enabled to provide service between Evansville and Chicago . . .";
2. "Such 'negotiations to begin as soon as feasible and to be completed not later than one year after the effective date of our order herein'; and
3. "Dixie Line is to submit for consideration of this Commission, by an appropriate application under section 5(2) of the Act, any agreement reached in the negotiations; but, if the parties are unable to arrive at mutually acceptable terms within the period set for the negotiations, that fact shall be brought to the Commission's attention with the filing of the said application; and, in either event, the Commission, pursuant to the Act, shall determine equitable, just and reasonable terms consistent with the public interest, upon which Dixie Line may accomplish the acquisition of the Eastern properties set out in Appendix C."

*Throughout the Commission's report and order the C&EI and the L&N are referred to, respectively, as "Eastern" and "Dixie Line."

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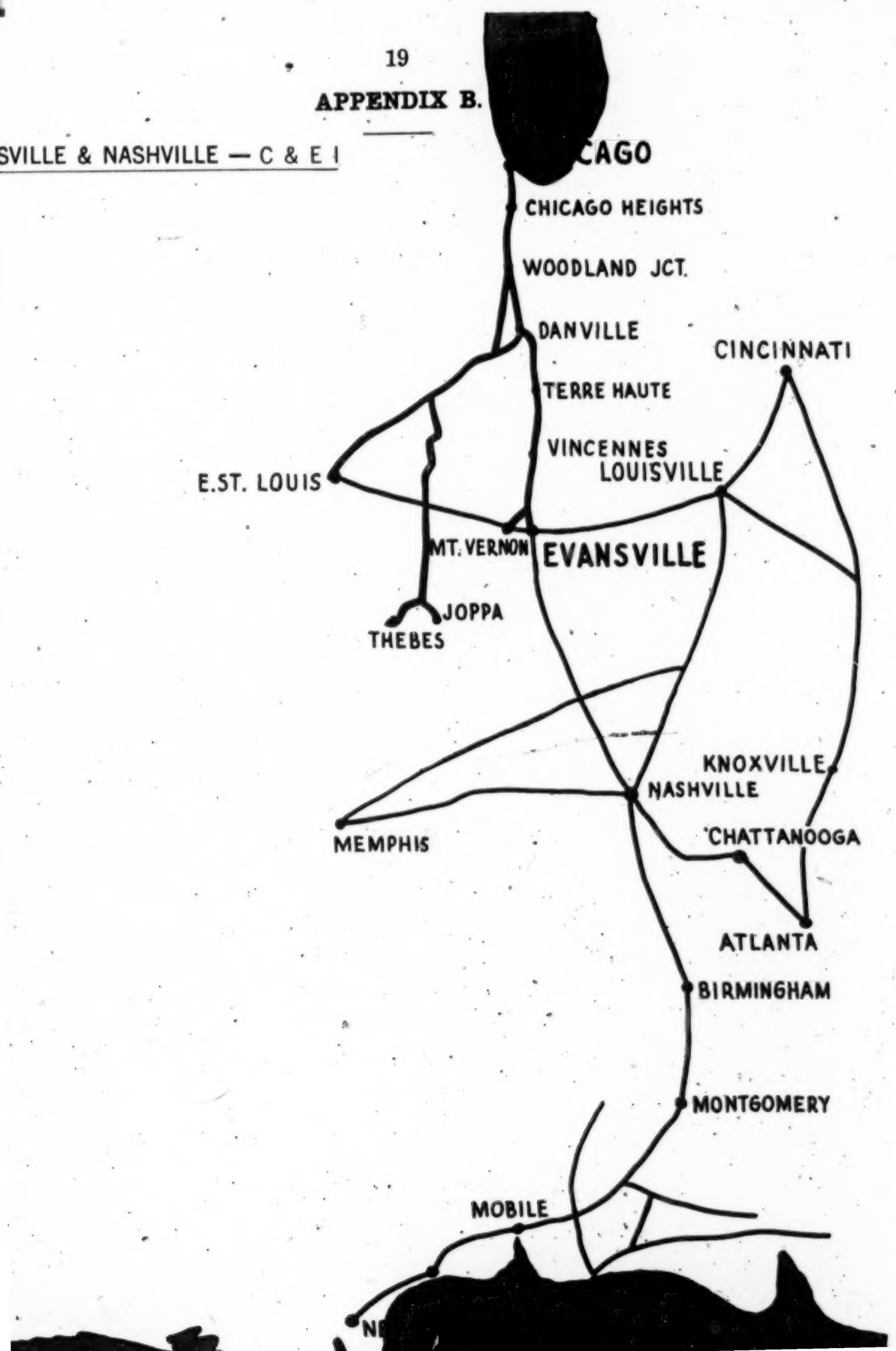
APPENDIX B.

SVILLE & NASHVILLE — C & E I



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Nos. 687, 688, 689

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

**ILLINOIS CENTRAL RAILROAD COMPANY,
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
and MONON RAILROAD,**

Appellants,

v.

**UNITED STATES OF AMERICA
and
CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY,
et al.**

Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

MOTION TO AFFIRM

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**UNITED STATES OF AMERICA
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et al.**

Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

MOTION TO AFFIRM

Appellee, Chicago & Eastern Illinois Railroad Company (C&EI), pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment and decree of the district court be affirmed on the ground that the questions are so unsubstantial as to not warrant further argument.

STATEMENT

This is a direct appeal from a final judgment and decree dated August 4, 1966, by a district court of three judges specifically constituted pursuant to 28 U.S.C. §§ 2284 and 2325, dismissing appellants' complaint which sought to set

aside certain orders of the Interstate Commerce Commission.

Control of the C&EI is the central issue in this case.

On September 19, 1961, the Missouri Pacific Railroad Company (MoPac) filed an application with the Interstate Commerce Commission in Finance Docket No. 21755 for authority under Section 5(2) of the Interstate Commerce Act to control the C&EI. This application was consolidated with a similar application filed by the Illinois Central Railroad Company (IC) for control of the C&EI (Finance Docket No. 21892), and also an investigation initiated by the Interstate Commerce Commission on its own motion to determine whether the MoPac or the Louisville & Nashville Railroad (L&N) had violated Section 5(4) of the Act by acquiring control of the C&EI without prior authority from the Commission (Finance Docket No. 21980). In addition, the L&N filed a petition with the Interstate Commerce Commission requesting that the successful applicant for control of the C&EI be required to sell the C&EI's Evansville-to-Chicago line to the L&N, or to grant trackage rights on that line to the L&N.

Extensive hearings were held with respect to these applications and petition. Following the hearings, in September 1963, the examiner who heard the case served his recommended report in which he recommended (i) approval of the MoPac's proposed control, (ii) denial of both the IC's proposed control and the L&N's petition for inclusion, and (iii) discontinuance of the investigation proceeding because he found that Section 5(4) of the Act had not been violated by either the MoPac or L&N.

Exceptions to this recommended report were filed and following oral argument before the entire Commission, it issued a report and order on March 8, 1965, granting authority to the MoPac to control the C&EI, denying the IC's

similar application for control, and discontinuing its investigation of the MoPac's purchases of C&EI securities, despite its finding that these purchases had in fact been in violation of Section 5(4) of the Act. The Interstate Commerce Commission also required the MoPac, after it assumed control of the C&EI, to negotiate with the L&N for the sale of the C&EI's Evansville line to the L&N.

Thereafter, the IC filed the instant action in the United States District Court for the Northern District of Illinois, Eastern Division, seeking to have the Commission's orders set aside. The Monon Railroad intervened, as plaintiff, and later the St. Louis Southwestern Railway Company intervened, also attacking the Commission orders. The court below granted a preliminary injunction enjoining the effectiveness of the Commission's orders until the case was fully heard on its merits. After briefs on the merits were filed and oral arguments presented, the court below affirmed the orders of the Interstate Commerce Commission.

ARGUMENT

The decision of the district court is plainly correct.

The underlying Interstate Commerce Commission orders in issue vitally affect the C&EI and its shareholders since the principal questions involved in both the Interstate Commerce Commission orders and in this case, are whether the MoPac or the IC could, through stock ownership, acquire control of the C&EI; whether as a condition of granting approval of control, the C&EI should be obligated to sell its Evansville-Chicago line to the L&N; and whether the MoPac or the L&N had acquired control of the C&EI in violation of law.

The C&EI believes that the Interstate Commerce Commission fully, completely, and fairly considered all the relevant facts involved and rendered a correct decision

based on adequate findings. The district court below, moreover, thoroughly considered the entire record and likewise rendered a correct decision. Although some of the questions raised below and in this Court by the appellants are important, the C&EI believes that these questions were adequately and fully resolved by the district court and, therefore, this Court need not take jurisdiction of the matter.

We respectfully submit, accordingly, that the appellants present no substantial questions for the decision of this Court and that the judgment and decree of the district court should be affirmed.

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239–431—66——1

In the Supreme Court of the United States

OCTOBER TERM, 1966

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v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

No. 689

MONON RAILROAD, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission jointly move that the judgment of the lower court be affirmed.

STATEMENT

This case involves direct appeals from the judgment of a three-judge district court (J.S. 1a–27a),[1] one judge dissenting (J.S. 28a–33a), sustaining an order of the Commission dated February 16, 1965, in its consolidated Finance Docket Nos. 21755, 21892 and 21980, whereby the Commission granted Missouri Pacific Railroad's application to acquire stock control of Chicago & Eastern Illinois Railroad (C&EI, referred to by the Commission as Eastern).

For many years prior to this case, C&EI was in a precarious financial position (J.S. 91a). It is a bridge and terminal railroad running south from Chicago to Woodland, Illinois, where it forms two branches: to East St. Louis and Thebes, Illinois on the west; and to Evansville, Indiana on the east. Its lines are end-to-end in relation to the lines of Missouri Pacific Railroad Company (MoPac)[2] and the Louisville & Nashville Railroad Company (L&N, referred to by the Commission as Dixie Line),[3] but are side-

[1] References are to appellants' Joint Appendices to Jurisdictional Statement.

[2] MoPac operates railroad lines in Arkansas, Colorado, Illinois, Kansas, Louisiana, Missouri, Nebraska, Oklahoma, and Texas. The principal points of interchange of traffic between MoPac and C&EI are St. Louis, Missouri, and East St. Louis and Thebes, Illinois (J.S. 117a).

[3] L&N operates 5,683 miles of railroad line in thirteen States. Its principal main lines extend from Cincinnati, Ohio, to New Orleans and to Atlanta, Georgia; from Louisville, Kentucky to St. Louis via Evansville; from Evansville to Nashville, Tennessee; from Bowling Green, Kentucky to Memphis, and from Paducah, Kentucky to Memphis. L&N interchanges freight traffic with C&EI at Greenville, East St. Louis and Evansville and through passenger traffic at Evansville. The lines of L&N

by-side in relation to the lines of appellant Illinois Central Railroad Company (IC)[4] between Chicago and East St. Louis. IC, which competes with C&EI, has direct access to the Chicago gateway; MoPac and L&N do not.

Both MoPac and IC applied to the Commission under 49 U.S.C. 5(2) for authority to acquire stock control of C&EI. L&N asked that, as a condition of any such authorization, C&EI be required to negotiate for the sale of the Evansville branch to it. Appellants Monon Railroad and St. Louis Southwestern Railroad (Cotton Belt) intervened in opposition to the application; Monon also opposed L&N's petition.

Prior to filing its application for control in September 1961, MoPac had purchased—without Commission authority—about 31 percent of C&EI's voting preferred stock and about 17 percent of its outstanding common stock. On April 9, 1962, it conveyed the securities to an independent voting trust (J.S. 82a) settled by MoPac to divest itself of the power to control C&EI (J.S. 86a). While the matter was still pending before the Commission, MoPac purchased certain C&EI bonds but immediately conveyed them

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and C&EI are supplementary and provide the shortest routes for traffic between Chicago and major points in the Southeast (J.S. 154a).

[4] IC operates 6500 miles of main and branch lines in fourteen midwestern and southern States. Its principal main lines extend from Chicago southwardly to New Orleans and southwesterly to St. Louis, southeasterly to Evansville, Indiana, and westerly to Omaha, Nebraska. IC's lines provide routes and service between Chicago and East St. Louis to the southwest and Evansville to the southeast, thus having common terminals with C&EI (J.S. 132a–133a).

to the trust (J.S. 17a). In September 1961, L&N also purchased enough C&EI voting preferred and common stock to give it a 27½ percent voting interest in the company. It immediately conveyed this to a voting trust like MoPac's (J.S. 88a). On its own motion, the Commission (J.S. 37a) began an investigation of the L&N and first MoPac purchase, and consolidated it with the pending control applications.

The voting trust agreements of MoPac and L&N contained substantially the same terms (J.S. 88a). They provided that the trusts were irrevocable and were to remain effective for ten years or until the occurrence of stated events (J.S. 86a).[5] No limitations or restrictions were imposed on the trustees' authority to vote the securities independent of the settlors (J.S. 88a).

The Commission's examiner held that neither Mopac nor L&N had violated Section 5(4) of the Act, 49 U.S.C. 5(4), by acquiring C&EI securities without Commission approval, because they had not exercised power of control. He recommended that MoPac's application should be granted, but that a condition requiring C&EI to negotiate with L&N for the sale of the Evansville line would not be in the public interest at the present time and should, therefore, not be imposed.

On exceptions, and after oral argument,[6] the

[5] These events are (1) the sale of the deposited securities to persons not affiliated with the settlors, or (2) a Commission order authorizing the release of the securities (J.S. 86a).

[6] Appellant Monon did not participate in the oral argument of exceptions before the Commission. Appellant Cotton Belt neither filed exceptions nor participated in the oral argument.

Commission held that MoPac had committed a violation of Section 5(4) when it purchased the C&EI stock without prior Commission approval, because its stock purchases gave it "negative control".[1] The Commission noted, however, that the violation was mitigated by (1) MoPac's voluntary creation in good faith of a voting trust, modeled on ones prescribed or approved by the Commission in other proceedings, that effectively divested it of its negative control over C&EI; and (2) by the fact that during the eight months prior to creation of the voting trust MoPac never exercised its power or influenced or attempted to influence C&EI's management (J.S. 84a–85a, 89a–90a).

The Commission agreed with the examiner's finding that L&N had not violated Section 5(4), since immediately upon acquisition it had subjected its stock interest in C&EI to a voting trust similar to that created by MoPac (J.S. 88a–89a). It also held that charges of various parties that MoPac had violated Section 5(4) by subsequent acquisitions of C&EI securities were moot since, immediately upon the acquisition of these securities, MoPac had placed them in the voting trust (J.S. 89a)

Turning to the public interest consideration, the Commission held that MoPac's application should be

[1] The Commission found that, assuming the amount of stock voted at C&EI stockholder's meetings would follow the established pattern of the preceding six years, MoPac's holdings were sufficient to have prevented the favorable vote of the two-thirds majority of stock required to approve a merger, lease or sale of assets, so that MoPac could have vetoed such transactions (J.S. 84a).

granted because its control of C&EI would (1) preserve that carrier as an operating railroad; (2) improve its financial status and physical facilities, and enable it to increase its participation in transcontinental traffic; and (3) furnish MoPac with direct-line access to and from Chicago, thus increasing its ability to compete with other major railroads operating directly to and from that gateway (J.S. 91a, 43a), without serious adverse effects upon other carriers serving the same territory (J.S. 92a).

With respect to the conditions requested by the L&N, the Commission found, as had its examiner, that with appropriate modifications L&N's proposal with respect to purchase of the Evansville line would be in the public interest, because it would afford the shippers in the Southeast the same advantages that MoPac's control of C&EI would afford shippers in the Southwest, and would result in substantially upgrading the line. Unlike the examiner, however, the Commission determined that imposition of the requested conditions and retention of jurisdiction by it were necessary in order to assure L&N of the opportunity to negotiate for acquisition of the Evansville line upon just and reasonable terms consistent with the public interest (J.S. 57a, 67a–68a).

Appellants' petitions for reconsideration alleging that C&EI's financial position had improved subsequent to the hearing were denied.

On petitions for review, a three-judge district court, one judge dissenting, affirmed the Commission's report and order (J.S. 1a–27a). The court held that the Commission had properly balanced MoPac's viola-

tion of Section 5(4) against the public benefit which would flow from MoPac's control of C&EI, and that the independent voting trust effectively insulated C&EI from MoPac's control. It also found substantial evidence in the record as a whole to support the Commission's findings that the public interest would be best served by MoPac's control of C&EI; that the provision for negotiations looking to sale of C&EI's Evansville line to L&N was a lawful condition; and that the Monon could raise any objections concerning the competitive effects of the sale when and if the final application for approval of the sale was submitted to the Commission. Finally, the court held that the Commission had not abused its discretion in refusing to reopen the record. The dissenting judge disagreed with the court's conclusions only on the nature and effect of the voting trusts (J.S. 28a–33a).

ARGUMENT

1. The Commission's conclusion that approval of MoPac's application for control of C&EI would be consistent with the public interest, and that approval of IC's competing application would not, is in conformity with this Court's decision in *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U.S. 173. In that case, as in this, the Commission approved a control application designed to preserve the independent existence of a small "bridge carrier," and denied a competing application which contemplated the disappearance of the bridge carrier as an independent

road.[8] There, as here, the Commission sought to preserve inter-railroad competition.[9]

2. Appellants' contention that the Commission should not have approved MoPac's application because of MoPac's allegedly flagrant violations of Section 5(4) was properly disposed of by the court below by reference to *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115, which recognized that the Commission is not required to disqualify a Section 5(2) applicant because of a prior Section 5(4) violation. The Commission has, of course, long applied the flexible standard that the bar to consideration of a Section 5(2) application by a Section 5(4) violator "will give way to a clear showing of public interest in approval." 371 U.S. at 129; see *Central of Georgia R. Co—Control,* 307 I.C.C. 39, 43. Its

[8] Compare the Commission findings discussed by the Court at 361 U.S. 182–85 with the virtually identical findings of the Commission herein at J.S. 43a–49a, 91a–92a, discussed by the court below at J.S. 16a.

[9] With respect to this important aspect of the case the Commission found:

> An important motive behind the Illinois Central proposal is the desire to deny to both Missouri Pacific and Dixie Line an expedient access to the Chicago gateway. If successful, this design would fortify Illinois Central against increased competition from two strong, long-line rivals, as well as permit the elimination of competition from a short-line rival. There is no justification in the record for providing for such curtailment of competition. Approval of the Illinois Central plan would deny to shippers and receivers in the Southeast and in the Southwest a vastly improved direct-line service to and from the Chicago gateway for which this record contains abundant evidence of need. [J.S. 45a.]

application in the present case does not raise a substantial question warranting plenary review. *Alamo Express, Inc.* v. *United States*, 382 U.S. 19, affirming *per curiam* 239 F. Supp. 694 (W.D. Tex.). No regulatory agency in fact follows a rule of absolute disqualification [10]—and for obvious reasons of common sense. Such a rule would require the disapproval of a transaction plainly in the public interest on the basis of a trivial or inadvertent violation; it would punish the violator, but it would punish the public more.

The Commission carefully balanced the competing considerations in this case: the clear public interest in MoPac's acquisition of C&EI; and the relatively minor nature of the Section 5(4) violation. The argument that the Commission attached undue weight

[10] It should be noted that the Civil Aeronautics Board's "Sherman doctrine" does not purport to impose an absolute bar to consideration of applications for approval of control by applicants found to have previously unlawfully achieved some measure of control over the carrier sought to be controlled, but precludes Board consideration, in the absence of exceptional circumstances, only until the alleged violation has been voluntarily terminated or until the violator has taken the corrective action required by the Board. *Colonial-Eastern Acquisition Case*, 23 C.A.B. 500. Although it is true that the Board has recently taken the position that the voluntary creation of a voting trust does not satisfy these requirements (*Allegheny Airlines, Inc., Enforcement Case*, CAB Order No. E–21280 (Sept. 15, 1964)), we point out that where overriding public interest considerations are involved the Board has not hesitated to approve control by an applicant charged with being in violation of Section 408. See, *e.g.*, *Toolco–Northeast Control Case*, 36 C.A.B. 280.

to the creation of the voting trusts is plainly without merit. Similar arrangements have many times been approved by the Commission as adequate to divest control. That they may be revocable at will as a matter of State law is surely wide of the mark, since any attempt at revocation while the control application was pending would be a flagrant violation of Section 5(4) and lead to immediate denial of the application. The contingency is a wholly remote one.

Having found that there was substantial evidence to support the Commission's conclusion "that MoPac control is the clearly preferable future status for Eastern" (J.S. 16a) and that "the Commission was correct in saying that 'unlike the flagrant disregard for the law which characterized the situation in *Central of Georgia Ry. Co. Control,* 307 I.C.C. 39 (1958), there are in the present record a number of factors mitigating the unlawful conduct'" (J.S. 14a–15a), the court below properly refused to substitute its judgment for that of the Commission. *United States* v. *Pierce Auto Freight Lines, Inc.,* 327 U.S. 515, 535–536; *Virginian Ry. Co.* v. *United States,* 272 U.S. 658, 663; *Illinois Central R.R. Co.* v. *Norfolk & W.R. Co.,* Nos. 15, 17 and 20, October Term, 1966, decided November 14, 1966, slip opinion, p. 12.

3. Monon does not challenge the Commission's conclusion that acquisition of control of C&EI by MoPac would be consistent with the public interest. Rather its attack goes only to that portion of the Commission's order which requires compulsory negotiations between MoPac and L&N for the sale to the latter of C&EI's line between Chicago and Evans-

ville, Indiana.[11] We submit that Monon's attack is premature.

It is essential to state precisely what the Commission did in this respect. The Commission made extensive findings (unchallenged in the court below or here) that L&N's operation of the Evansville line would produce substantial service benefits for many shippers on traffic moving between Chicago and the Southeast. These findings support the Commission's conclusion (J.S. 57a) that "We would be derelict in our responsibility to serve the public interest, if, in the face of this record, we failed to provide [L&N] an opportunity to acquire the Evansville line," and that "with appropriate modification of [L&N's] proposal, the operation of that line by [L&N] would be consistent with the public interest." Accordingly,

[11] At this point, we note that Monon now states (J.S. 6) that "The Commission found that control of the C&EI by MoPac would be authorized if, and only if, the L&N operates through trains over the C&EI's Evansville-to-Chicago line". This statement misreads the Commission's report. The Commission has required, *as a condition subsequent* to MoPac acquiring control of C&EI, that MoPac cause C&EI to negotiate with L&N for the sale of the Evansville line upon terms agreed to by the parties, or if need be prescribed by the Commission, but, in either event, the purchase is to be considered by the Commission in another, separate Section 5 proceeding (J.S. 67a–68a); and, further, that if MoPac fails to acquire sufficient control of C&EI to comply with this condition, it must "divest itself forthwith of all of its Eastern holdings" (J.S. 92a). It is clear, however, that if the Commission prescribed sale terms which were unacceptable to L&N, the latter would be under no obligation to buy and MoPac could retain control of all of C&EI. Thus, there is no basis for Monon's contention that the Commission's authorization to MoPac cannot be final because Monon can still challenge acquisition of the Evansville line by L&N.

the Commission decided to require compulsory negotiations (upon MoPac's acquisition of control of C&EI), "but beyond that, any further action by us as to the purchase or lease must await the adduction of facts upon an appropriate record yet to be made." (J.S. 57a.) The Commission further specified (J.S. 68a) that L&N:

> * * * is to submit for consideration of this Commission by an appropriate application under section 5(2) of the Act, any agreement reached in the negotiations; but, if the parties are unable to arrive at mutually acceptable terms within the period set for the negotiations, that fact shall be brought to the Commission's attention with the filing of the said application; and, in either event, the Commission, pursuant to the Act, shall determine equitable, just and reasonable terms consistent with the public interest, upon which Dixie Line may accomplish the acquisition of the [Evansville line] * * *.

Monon contends, variously, that the Commission erred in finding that operation by L&N of the Evansville line would be "consistent with the public interest" without making findings as to its impact upon Monon as a competing carrier.

Treating with Monon's contentions, the court below concluded (J.S. 26a) that:

> Strictly speaking, we have before us only the question of the warrant in fact and law for the order requiring compulsory negotiations. It is not likely that mere negotiations will have any competitive effect whatsoever.
>
> The Commission appears to have decided, as it was required to do, the question of the ultimate desirability of L&N control of the Evans-

> ville line. While the findings that L&N's competitors would not be significantly injured by the proposed sale are probably sufficient under cases such as *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87–88 (1944), and are probably supported by substantial evidence, we need not decide these questions today. Monon will have ample judicial protection if and when the final L&N § 5(2) application for purchase of the Evansville line is approved by the Commission. Monon can raise its objections at that time.

The court below was clearly correct in holding that if and when L&N files an application under Section 5(2) for authority to acquire the Evansville line, Monon will have a further opportunity to show the competitive effects upon it of L&N operation of the Evansville line and to contend that such effects require denial of the application.[12]

The Commission made this crystal clear in its report and order of April 6, 1966, in *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475, authorizing a merger of those railroads. In that proceeding, Monon petitioned for further hearing and either inclusion in that merger or further protective

[12] There is no substance to Monon's contention (J.S. 9) that "the Commission decision and order established the immediate right in the L&N (App. p. 68a) to provide service over the Evansville line on a temporary basis pending final acquisition." It is clear on the face of Section 5(2) of the Interstate Commerce Act that there is no form of lease, operating agreement or trackage rights under which L&N could engage in interim operations over the Evansville line without applying for and obtaining specific authorization from the Commission. Moreover, L&N has publicly stated that it will not seek any such interim authorization.

conditions, alleging developments following the close of hearings which would make Monon more vulnerable to effects of a Penn-Central merger. One of the developments there cited by Monon was the approval in the instant case "of control of C&EI by [MoPac] with a condition respecting the acquisition by [L&N] of C&EI's line between Evansville, Ind., and Chicago, Ill." In denying Monon's motion, the Commission made the following statement (327 I.C.C. at 540):

> In Finance Docket No. 21755, L&N is accorded the right merely to negotiate for the acquisition of C&EI's Evansville-Chicago line. The acquisition itself would require our prior approval in a separate section 5(2) proceeding, *and any adverse effect thereof upon other carriers would be material to that proceeding, not here.* [Emphasis added.]

In this case, the Commission stated (J.S. 57a) that, with appropriate modification of L&N's proposal, operation of the Evansville line by L&N "would be consistent with the public interest"—the ultimate finding which it must make under Section 5(2). It was the predicate—and a necessary one—for requiring Mopac to agree to the transfer of the Evansville line to L&N on terms later to be approved or prescribed by the Commission on a record subsequently to be compiled. This finding, mandatory as to the negotiation conditions, specifically holds the way open for a full reappraisal of the competitive circumstances (including the effect upon Monon and other carriers), when and if L&N files an application under Section 5(2). It will also be relevant at that time to determine whether an approval should be accompanied by special conditions for the protection of Monon. Accordingly, there is no basis for Monon's view that in

such a subsequent Section 5(2) proceeding principles of *res judicata* will preclude it from challenging, or the Commission from reconsidering, whether the transaction, as finally shaped, will be "consistent with the public interest".

4. In the specific circumstances here, the Commission properly exercised its discretion when it declined to reopen the record to consider the subsequent acquisitions of C&EI securities by MoPac and the evidence of a late improvement in C&EI's revenues. The securities acquired by MoPac were immediately transferred to the independent voting trust which the Commission had already found effectively insulated C&EI from control by MoPac. While this practice is not to be condoned, as the Commission made clear when it found that Section 5(4) had been violated (J.S. 89a), neither does it require that the substantial benefits of the transaction be denied to the public. As to C&EI's improved fortunes, the Commission's decision took into account C&EI's financial and operational problems over many years (J.S. 91a). The relatively short range improvement in C&EI's operating results cited by appellants was not sufficient to require reopening here.[13] In the circumstances of this case, such a recent change in the company's financial condition is hardly the overwhelming

[13] As the Commission specifically stated in its order of June 23, 1966, denying Cotton Belt's belated petition for reopening and further hearing, "the alleged recent short-term improvement in the financial condition of the Chicago & Eastern Illinois Railroad Company is insufficient to warrant reconsideration of the Commission's conclusion, based on the long-term history of the carrier, that its affiliation with a stronger railroad will be consistent with the public interest."

change in circumstances which required rehearing in *Atchison, T. & S. F. R. Co.* v. *United States,* 284 U.S. 248. The Commission's refusal to reopen for the reasons advanced was well within the standards for rehearings defined in *United States* v. *Pierce Auto Lines,* 327 U.S. 515, 535 and *Interstate Commerce Commission* v. *Jersey City,* 322 U.S. 503, 514.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

ILLINOIS CENTRAL RAILROAD COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, MONON RAILROAD,
Appellants,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

MOTION TO AFFIRM OF APPELLEE MISSOURI PACIFIC RAILROAD COMPANY

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IN THE

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ILLINOIS CENTRAL RAILROAD COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, MONON RAILROAD,
Appellants,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

MOTION TO AFFIRM OF APPELLEE MISSOURI PACIFIC RAILROAD COMPANY

Pursuant to Rule 16(1)(c) of the Rules of this Court, appellee Missouri Pacific Railroad Company* moves that the judgment of the District Court be affirmed.

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* Herein referred to as "MoPac." "I.C. brief" refers to the Jurisdictional Statement of the Illinois Central Railroad Com-

Statutes Involved

The pertinent portions of Sections 5(2) and 5(4) of the Interstate Commerce Act (49 U.S.C.) are set out in the Cotton Belt's brief, pages 3 to 4. Section 5(7) of the Act provides in pertinent part:

> "If the Commission finds after such investigation that such person is violating the provisions of such paragraph [subsection 4], it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation."

Statement.

This action was commenced on September 18, 1961, when MoPac filed a petition with the Interstate Commerce Commission for permission to seek financial control of C&EI. Thereafter L&N filed an application for like control of C&EI, which it later replaced with a request that any control order entered by the Commission in favor of either MoPac or any other railroad grant L&N the right to purchase or lease C&EI's Evansville line. Illinois Central, motivated by a desire to keep both MoPac and L&N from gaining direct access to Chicago, rather than by any real

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pany ("Illinois Central"), and "Cotton Belt brief" to that of the St. Louis Southwestern Railway Company. "App." refers to the Appendices to appellants' Jurisdictional Statements. "Tr." refers to the transcript of the hearings before the Examiner, and "St." refers to testimony received in the form of prepared witnesses' statements. "I.C.C." refers to Interstate Commerce Commission. "C&EI" refers to the Chicago & Eastern Illinois Railroad Company; "L&N" refers to the Louisville and Nashville Railroad Company; and "C&NW" refers to the North Western Railway Company.

interest on its part in C&EI,* thereafter filed its own application for financial control of C&EI. Monon, Cotton Belt, C&NW, and several other railroads appeared at various stages of the proceedings in connection with part or all of the case. All of these applications and petitions were consolidated for hearing, together with an investigation by the Commission's Bureau of Inquiry and Compliance of a charge that MoPac and L&N had violated Section 5(4) by purchases of C&EI securities.

After extensive public hearings in Washington, D.C., Chicago and Evansville, Indiana, the Examiner issued a detailed Report finding that MoPac's application for permission to seek financial control of C&EI and to effect an "end to end" coordination with C&EI was clearly in the public interest and should be granted; that Illinois Central's petition was contrary to the public interest and should be denied; that L&N's petition for inclusion as to the Evansville line should be denied; and that neither MoPac nor L&N had violated Section 5(4). Portions of this Report, adopted by the Commission, are set out at App. 99 to 194.

While the case was pending before the full Commission on exceptions to the Examiner's Report,** C&NW moved

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* "An important motive behind the Illinois Central proposal is the desire to deny to both Missouri Pacific and Dixie Line [L&N] an expedient access to the Chicago gateway. If successful, this design would fortify Illinois Central against increased competition from two strong, long-line rivals, as well as permit the elimination of competition from a short-line rival." (Commission's Report, App. 45.)

** The conditions sought by the Cotton Belt were recommended by the Examiner, and it neither filed exceptions to the Report nor participated further in the case during its pendency before the Commission. During the final stages of the review proceed-

to re-open the record in order to submit financial statements of C&EI for the third and fourth quarters of 1963, copies of which were attached to the motion. The motion was denied.

Illinois Central moved to re-open the record with respect to purchases by MoPac of C&EI convertible bonds. MoPac had previously made a full report of each of these purchases to the Commission and the parties, including the fact that contemporaneously with their purchase the bonds had been placed in a voting trust (Appendix B) by direct delivery by the seller to the Marine Midland Trust Company of New York, the trustee of the voting trust. This motion was denied (App. 89).

The Commission adopted most of the reasoning and findings of the Examiner. With respect to whether MoPac control of C&EI would be in the public interest, the Commission said (App. 91-92):

> "Eastern's preservation as a prosperous competitive rail carrier under the control of Missouri Pacific and its corporate parent, Mississippi Fuel, is clearly in the public interest—certainly far more so than would be its eventual subjugation and disintegration under the control of Illinois Central and Illinois Industries, or its continued operation as a self-restricted, financially weak system as at present. Its operation by Dixie Line [L&N] on the eastern branch and Missouri Pacific on the west as herein described would make available to a large number of shippers in the

---

ings before the three-judge court—after MoPac had filed an application with the Commission for control of the Alton & Southern Railway Company, in opposition to Cotton Belt's like application (Cotton Belt Pet. for Leave to Intervene, p. 2)—Cotton Belt entered the case at bar and raised objections to MoPac control of C&EI which it had not theretofor urged.

growing areas of the Southwest and Southeast a new single-line rail service to and from Chicago which many have not had before; and, as previously explained, other carriers in the territory will not be affected to the extent that denial of the Missouri Pacific's application would be warranted on that ground."

The Commission based these conclusions upon a great volume of evidence. The maps reproduced in Appendix A to this brief illustrate, on the one hand, the complementary, non-competitive, end-to-end relationship between MoPac and C&EI at St. Louis, Missouri, and Thebes, Illinois, as well as between the L&N and C&EI at Evansville, Indiana, and on the other hand, the parallel, side-by-side competitive relationship which exists between C&EI and Illinois Central throughout almost all of C&EI's trackage.

C&EI is a short-haul, bridge railroad which has been plagued over the years by inherent financial and competitive weaknesses, most of which will be solved by MoPac control. C&EI facilities will remain intact and be renovated and will become an extention of MoPac lines into Chicago. MoPac will provide C&EI with much needed additional traffic, new equipment and facilities, as well as financial support. (Sts. E; BE, pp. 17-20; U, p. 6; V, p. 5.) It is estimated that after five years under MoPac control, C&EI's net annual operating income will increase by $6,000,000. (App. 127.)

At present, all MoPac traffic to Chicago must be switched to other carriers, usually at the congested St. Louis terminal. A connection between MoPac and C&EI at Thebes, Illinois will establish the first direct, non-stop, single-line service between Chicago and many parts of the vast Southwest. Substantial reductions in shipping costs will be achieved. Freight schedules will be improved as much as 30 hours. (St. B; St. C, pp. 7-14.) Numerous shippers,

receivers and public witnesses testified to the need for this improved service. (See, for example, Sts. J, M, S. T. U, V, W, X, Y, Z, AA, AD, AG, AS; Tr. 1822-27, 1863-66, 1875-78, 1915-21, 1932-35, 2021-23, 2143-46, 2654-57, 2697-2700, 3276-3313.)

Contrary to labor's usual reaction to control applications, representatives of the unions for both MoPac and C&EI employees testified in support of MoPac's control, in anticipation of the additional traffic for both carriers and the additional jobs which will result. (Tr. 219, 233-34.)

For a more complete discussion of the evidence of the benefits which will result from the Commission's order we respectfully refer the Court to pages 41 to 49, 91 to 92, and 183 to 189 of appellant's Appendices.

The Commission disagreed with the Examiner's findings and recommendations in only two respects of any consequence, namely: (1) The Commission held that when MoPac acquires control of C&EI, it must negotiate with L&N for sale or lease of the Evansville line. (App. 54 to 69.) (2) The Commission found that for an 8-month period during 1961 and 1962 MoPac had been in violation of Section 5(4) in that it owned approximately 30% of the C&EI Class A stock, which gave MoPac a potential power to veto certain extraordinary corporate transactions such as mergers or sales of all assets. The Commission found, however, that this temporary violation was mitigated in that MoPac had made no effort to control C&EI or to elect members of C&EI's board, and was ended when MoPac placed the stock in a voting trust, with a competent, independent trustee, the Marine Midland Trust Company of New York. (App. 82 to 90.) The Commission concluded (App. 90):

> "In our opinion, the public interest considerations in these proceedings overwhelmingly favor approval of Missouri Pacific's control of Eastern subject to conditions for inclusion of [L&N] notwithstanding the section 5(4) violation."

The Illinois Central and the Monon thereupon filed this action in the District Court to enjoin the Commission's order. Long after the case was at issue and the parties had filed briefs on the merits, and shortly before the three-judge court was to hear oral arguments and take the case under advisement (May 9, 1966), Cotton Belt sought and was granted leave to intervene as a plaintiff. Shortly prior thereto MoPac had filed an application with the Commission for control of Alton & Southern Railway Company, in opposition to Cotton Belt's like application. (Cotton Belt Pet. for Leave to Intervene, p. 2.)

On May 4, 1966 (five days before the three judge District Court took this case under advisement), Cotton Belt presented to the Commission a petition to re-open proof and for further hearings, in which it relied primarily upon the claim that the financial condition of C&EI had improved. The Commission denied the motion on June 29, 1966 because (*inter alia*) "the alleged recent short-term improvement in the financial condition of [C&EI] is insufficient to warrant reconsideration of the Commission's conclusion, based on the long-term history of the carrier, that its affiliation with a stronger railroad will be consistent with the public interest." The full order of the Commission is set forth in Appendix C to this brief.

A majority of the three-judge District Court affirmed the order of the Commission. (App. 1 to 34.) The Court held that the evidence supported the Commission's findings

that MoPac control of C&EI was in the public interest, and that the Commission was justified in finding that the public interest in MoPac control outweighed its temporary violation of Section 5(4). (App. 5 to 16.) The Court sustained the Commission's refusal to re-open proof with regard to MoPac's purchase of C&EI bonds in 1964 (App. 16 to 21), and with regard to C&EI's financial condition. (App. 22 to 24.) The Court also upheld the Commission's conditions in favor of L&N regarding the Evansville line. (App. 24 to 27.)

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL.

I.

Appellants Do Not Challenge The Commission's Finding That MoPac Control of C&EI Is Consistent With the Public Interest.

The ultimate question which the Commission was required to determine was whether the proposed control of C&EI by MoPac is "consistent with the public interest." (49 U.S.C. § 5(2) (b).)

The uncontradicted evidence supports the Commission's findings that MoPac control of C&EI will materially improve the efficiency of the national transportation system, particularly with respect to freight moving between Chicago and the Southwest, and will at the same time remedy C&EI's inherent financial and competitive defects. Appellants do not challenge these findings in this Court, and, in fact, did not seriously challenge them below.

Rather than attacking the Commission's findings as to public interest, appellants turn to purely collateral issues which involve solely the exercise of discretion by the Commission in weighing competing public interest considerations. Appellants dwell upon Section 5(4) of the Interstate Commerce Act, which prohibits a carrier's acquisition of control of another carrier without prior Commission approval. Appellants seek to posture this case as one involving far-reaching considerations of the meaning and effect of Section 5(4). In reality, no novel or im-

portant question is involved. The Commission, properly weighing the competing public interest considerations, resolved the Section 5(4) issue in accordance with the recent holdings of this Court in *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115 (1962), and *Alamo Express, Inc.* v. *United States,* 382 U.S. 19 (1965), summarily affirming without opinion, 239 F.Supp. 694 (W.D. Tex. 1965).

Since "there is warrant in the law and the facts for what the Commission has done" (*United States* v. *Pierce Auto Freight Lines, Inc.,* 327 U.S. 515, 536 (1946)), the judgment below should be summarily affirmed, thus permitting the affiliation of C&EI and MoPac to proceed without further delay.

Appellants' opposition to MoPac control of C&EI, while perhaps understandable, is far from commendable when viewed in light of the public interest. Illinois Central's objections are motivated, as the Commission found, by "the desire to deny to both Missouri Pacific and [L&N] an expedient access to the Chicago gateway . . . [in order to] fortify Illinois Central against increased competition from two strong, long-line rivals, as well as permit the elimination of competition from a short-line rival [C&EI]." (App. 45.) As for Cotton Belt, it retired from this case in 1963, satisfied with the Hearing Examiner's Report, and did not return until this year, when the case in the District Court was nearly concluded, and then only after MoPac had refused to withdraw its opposition to Cotton Belt's application for control of the Alton and Southern Railway. (Cotton Belt Pet. for Leave to Intervene, p. 2; MoPac Response to Pet. for Leave to Intervene, pp. 3-4.)

II.

In Accordance With the Rulings of This Court In the Gilbertville and Alamo Cases, the Commission and the District Court Correctly Held That the Commission Must Determine Whether the Public Interest In MoPac Control of C&EI Outweighs MoPac's Violation of Section 5(4).

[Answer to I.C. brief, Part I, pp. 13-18, and C.B. brief, Part III, pp. 16-17.]

Illinois Central and Cotton Belt assert that the Commission erred when it stated, "even though we find a statutory violation through the unlawful acquisition of control, we are not free to summarily deny Missouri Pacific's application." (App. 89.)

The Commission's holding correctly states the law. In *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115, 129 (1962), this Court said that the rule embodied in Section 5(4) ". . . is not automatic and will give way to a clear showing of public interest in approval." This Court cited with approval the Commission's leading decision on this question, *Central of Georgia*, 307 I.C.C. 39, 43 (1958), in which the Commission held that a violation of Section 5(4) "is not necessarily a bar to approval of an application under section 5(2), if, upon consideration of all the facts, it clearly appears that the public interest will be served best by such approval." (371 U.S. at 128.)

In *Gilbertville*, this Court held that the Commission has a duty to weigh all competing public interest considerations, including any violations of Section 5(4), and that the Commission may grant permission to control to a carrier despite its breach of Section 5(4) if the Commission

concludes on all the facts before it that to do so would best serve the public interest (371 U.S. at 129-130):

> "... as §5(7) itself implies, the Commission's power is corrective, not punitive. The justification for the remedy [of divestiture] is the removal of violation.
>
> "... the choice of remedy is as important a decision as the initial construction of the statute and finding of a violation. The court or agency charged with this choice has a heavy responsibility to tailor the remedy to the particular facts of each case so as to best effectuate the remedial objectives just described."

Unless the Commission has the right to excuse violations of Section 5(4) where the proposed control, all things considered, will best serve the public interest, it will be prevented from carrying out the very purpose for which it was formed—the protection of the public.

The very same issue came before this Court last year in *Alamo Express, Inc.* v. *United States,* 382 U.S. 19 (1965), affirming 239 F.Supp. 694 (W.D. Tex. 1965). The brief filed in the case at bar by appellee Leighton contains the pertinent quotations from the briefs filed in the *Alamo* case, which show that the appellants in that case raised the same issue raised by appellants here. Following the precedent set in *Gilbertville,* this Court in *Alamo* summarily granted motions to affirm.

The issue tendered by appellants does not call for plenary consideration by this Court.

III.

The Commission Did Not Abuse Its Discretion. The Commission and the District Court Correctly Held That the Benefit to Shippers, Receivers and the Public Which Will Result From MoPac Control of C&EI Outweighs Any Possible Adverse Effects Upon the Prerogatives of the Commission Occasioned by MoPac's Brief Violation of Section 5(4).

[Answer to I.C. brief, Parts II, III and IV, pp. 18-29, and C.B. brief, Parts I and II, pp. 11-16.]

Appellants argue that even if the Commission has power to excuse a Section 5(4) violation, it abused its discretion in this case because (1) MoPac's purchase of C&EI securities was intended to discourage other carriers from interest in C&EI, and (2) MoPac's power to control C&EI did not cease when MoPac placed its C&EI securities in trust.

A.

THE COMMISSION FULLY CONSIDERED MoPAC'S TEMPORARY VIOLATION OF SECTION 5(4), AND CORRECTLY HELD THAT THE PUBLIC BENEFIT THAT WILL FLOW FROM MoPAC'S CONTROL OF C&EI MATERIALLY OUTWEIGHS WHATEVER PUBLIC BENEFIT MIGHT ACCRUE FROM HEAVY HANDED APPLICATION OF SECTION 5(4).

MoPac's outright ownership of approximately 30% of the C.&E.I. Class A stock was deemed by the Commission to be a violation of Section 5(4), because the consent of two-thirds of the holders of Class A stock is required to approve certain extraordinary corporate actions such as merger, sale of all assets, and the like. However, the Commission concluded that the nature, character, extent of and circumstances surrounding the violation were not so compelling as to outweigh the strong public interest that will be served by granting MoPac the right to acquire financial

control of C.&E.I. Among the facts which support the Commission's conclusion are:

— MoPac had but a limited veto power. This kind of negative power had never before been held to constitute a violation of Section 5(4), and indeed the Hearing Examiner held that it did not. (MoPac does not here challenge the Commission's contrary ruling.)

— MoPac disclosed to the Commission its purchase of the C&EI Class A stock (August 3, 1961) in the application it filed soon thereafter (September 18, 1961) for control of C&EI.

— When a question was raised as to the legality of MoPac's outright ownership of the Class A stock (and less than 9 months after the purchase) MoPac executed a voting trust agreement with the Marine Midland Trust Company of New York (April 20, 1962), and placed the stock into the trust, which effectively divorced MoPac from voting control of the C&EI stock.

— The voting trust agreement was fashioned after others previously approved by the Commission, and was designed to vest full control over the stock in the trustee.

— The Commission found that the Marine Midland Trust Company is "reputable, competent, experienced, and fully qualified," that it has "long been recognized as outstanding in [its] field," that it has no relation with MoPac other than this trust agreement, and that it has acted as trustee "independently and impartially, free from any participation, suggestion, or control" of MoPac. (App. 88.)

In light of these facts, the Commission was well within its discretion in finding that the "overwhelming" public interest favoring MoPac control of C&EI outweighed

MoPac's brief and inadvertent violation of Section 5(4). (App. 91.)

Since it is the Commission's prerogatives which are involved when Section 5(4) is breached, and since the Commission is in the best position to fashion the appropriate relief pursuant to Section 5(7), the three judge District Court correctly declined to interfere with the Commission's resolution of this issue. (App. 16.)

Appellants misstate the record when they argue that MoPac bought the Class A stock for the purpose of blocking mergers between C&EI and other railroads. MoPac acquired the Class A stock as a part of a block of four types of C&EI securities which had been placed on the market by a decedent's administrator, as a prelude to its application for control of C&EI. (Jencks, St. A., pp. 8-10; Tr. 149-51, 169-70.)

Neither does the record support appellants' assertion that MoPac's purchase in fact deterred other railroads from seeking to acquire an interest in or control of C&EI. Illinois Central has persistently pursued its application for control of C&EI. L&N withdrew from merger discussions with C&EI only because L&N management concluded that it was interested in acquiring only the Evansville portion of the C&EI lines. (Kendall, Tr. 3012.) There is no evidence that any other railroad was seriously contemplating merger with C&EI.

Appellants claim that the Commission overlooked the veto power over mergers held by owners of the Class A stock. On the contrary, the Commission carefully analyzed all of the powers of the Class A stock (App. 83-85). It was the existence of these "elements of control" (App. 84) which led the Commission to find that MoPac had acquired

a negative power to control C&EI and thus had violated Section 5(4). The Commission properly decided that under all the facts presented, including the weighing of the strong public interest in MoPac control of C&EI against the nature of MoPac's conduct, the temporary and limited violation by MoPac of Section 5(4) did not require or justify denial of MoPac's application for control of C&EI.

This judgment was well within the Commission's discretion.

B.

THE MARINE MIDLAND VOTING TRUST REMOVED ANY POWER MoPAC MAY HAVE HAD TO CONTROL C&EI.

The three judge District Court and the Commission correctly held that, as a practical matter, the voting trust established by MoPac completely insulated MoPac from power to control C&EI. The voting trust was patterned after agreements which the Commission had prescribed in other cases as sufficient to end Section 5(4) violations. (App. 86-87). The very purpose of the trust was, as the voting trust instrument recited, ". . . that MoPac shall not be enabled, until such time as control by it of C&EI may be authorized in accordance with applicable provisions of law, to exercise any voting rights incident to any stock of C&EI now owned or hereafter acquired by it. . . ." (See Appendix B to this brief, p. App. 6.) Under the terms of the voting trust, the trustee may not assent to and must conduct itself so as to serve as a barrier against control of C&EI by MoPac, absent prior Commission approval. The trustee has in fact acted independently of MoPac. (App. 88.) The trust is irrevocable for 10 years, unless MoPac's application for control of C&EI is approved by the Commission or the securities are sold. The Commission is given the power to prevent any amendment to the instrument which does not meet with its approval.

Under these circumstances, the Commission and the District Court acted well within the permissible range of discretion in holding that the voting trust cured MoPac's violation of Section 5(4) by removing any power it had to control C&EI through stock ownership.

Appellants argue that the Commission found the voting trust to be irrevocable, and relied on this finding in ruling in MoPac's favor on the Section 5(4) issues. They argue that this was error because, under general principles of trust law, the settlor-beneficiary of a trust may revoke at will.

Appellants' statements of general trust law have no application here. Under applicable statutes and case law, the MoPac-Marine Midland voting trust is irrevocable.*

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* Appellants' theoretical revocability argument is unsound in law, let alone impractical. Both New York (where the trustee and the securities are located) and Indiana (the state of incorporation of C&EI) have statutes which expressly provide for 10-year irrevocable voting trusts. *New York Stock Corporation Law* §50; *In re Morse,* 247 N.Y. 290, 160 N.E. 374, 376 (1928); and Ind. Stat. Ann. §§ 25-255 *et. seq.* Moreover, the settlor-beneficiary of a commercial trust may not revoke without the consent of those who have an interest in having the purpose of the trust fulfilled. *Hearst* v. *American Newspapers, Inc.,* 51 F.Supp. 171, 178 (D. Del. 1943). Furthermore, since MoPac represented to the Commission that the voting trust is irrevocable, it is estopped to attempt to revoke. *Casey* v. *Galli,* 94 U.S. 673, 680 (1876); *Dickerson* v. *Colgrove,* 100 U.S. 578-580 (1879).

Section 23 of the New York Personal Property Law, upon which appellants rely, does not apply if the trust instrument reserves the power to revoke only under stated conditions. *In re Mordecai's Trust,* 24 Misc. 2d 668, 201 N.Y.S.2d 899, aff'd. 12 App. Div. 2d 449, 210 N.Y.S.2d 478 (1960). Even under Section 23, the trustee as well as the settlor-beneficiary must agree to revocation. *Tompers* v. *Bank of America,* 217 App. Div. 691, 217 N.Y.S. 67, 74-75 (1926).

Irrespective of this however, as the District Court held, the theoretical revocability or non-revocability of the voting trust is immaterial. The crucial fact is that, as a practical matter, the voting trust agreement actually insulates MoPac from control of C&EI. Moreover, as a practical matter MoPac would not revoke the trust, even if it could. If the trust were revoked without Commission approval, the Commission could and would undoubtedly immediately vacate its order granting MoPac authority to gain control of C&EI and order it to divest itself of its C&EI stock. The District Court described the realities involved here when it said (App. 12-13):

> "We think the Commission correctly approved this trust, regardless of the technical rules of the laws of trusts.
>
> • • •
>
> "A MoPac revocation would endanger the very goal MoPac seeks: control of Eastern. It is beyond reasonable comprehension to suppose that MoPac would revoke this trust prior to gaining Commission approval.
>
> • • •
>
> "For the purposes of § 5(4), this practical barrier to revocation is sufficient. It amounts to irrevocability. . . ."

The Commission is and must be concerned with practicalities in exercising the discretion granted to it under Section 5(7). The Commission will not approve a sham disposition of power, but neither will it reject a true, good faith disposition of power such as occurred here, merely because of some purported legal technicality.

The District Court was correct in upholding the Commission's finding that MoPac's violation of Section 5(4) was terminated by the voting trust.

IV.

The District Court Correctly Held That The Commission Acted Within Its Discretion In Denying The Petitions To Re-Open Proofs.

[Answer to I.C. brief, Part V, pp. 29-34, and C.B. brief, Parts IV and V, pp. 17-21.]

A.

THE COMMISSSION'S REFUSAL TO RE-OPEN PROOFS TO HEAR FURTHER EVIDENCE REGARDING MoPAC SECURITIES PURCHASES RAISES NO SUBSTANTIAL QUESTION.

Almost a full year after the Hearing Examiner had filed his Report, Illinois Central filed a motion before the full Commission to re-open the proof, alleging that MoPac had, some six months earlier, purchased C&EI bonds through exercise of options theretofore entered into with Dempsey-Tegler, Inc. and Eastman-Dillion Union Securities Company, and that these purchases constituted a violation of Section 5(4). However, Illinois Central ignored the controlling fact that contemporaneously with their purchase those securities were immediately and directly deposited in the Marine Midland voting trust. MoPac never had possession or control of them. Moreover, MoPac immediately reported the purchases to the Commission and all parties. (Reply of MoPac to I.C. Petition to Reopen, dated Aug. 31, 1964.)

Thus, the evidence which Illinois Central sought to introduce by its petition to re-open was already in the record before the Commission.

The District Court upheld the Commission's finding that the acquisition of the options to purchase and their subsequent exercise did not constitute a further violation of

Section 5(4) nor warrant re-opening of the proof. (App. 21.) The District Court and the Commission recognized that even if the signing of the option agreements were treated as equivalent to MoPac's having acquired a right to obtain immediate access to the bonds through exercise of the options, there were conditions precedent to MoPac's translating this right into actual voting power in C&EI. The options would have given MoPac access to voting stock in C&EI only if MoPac (1) purchased the bonds, (2) converted them to common stock, and (3) retained that stock rather than transferring it to the voting trust.

When MoPac actually exercised the options, the bonds were deposited contemporaneously and directly into the voting trust. The Commission correctly held that this created a genuine and effective insulation against MoPac's control of those securities.

The Commission's discretion in considering a motion to re-open is extremely broad, and will be disturbed only upon "a showing of the clearest abuse of discretion. . ." *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535 (1946). The Commission's discretionary refusal to re-open the record to hear evidence which was already before it, and which was, in any event, of little significance under the facts of this case, does not warrant plenary review in this Court.

B.

THE COMMISSION'S REFUSAL TO RE-OPEN PROOFS REGARDING C&EI'S FINANCIAL CONDITION PRESENTS NO SUBSTANTIAL QUESTION.

In his Report filed in September, 1963, the Hearing Examiner found that C&EI suffered from chronic, fundamental, financial problems which could not be rectified by

momentary upswings in current income. The Examiner included in his findings on financial conditions express references to the probability of future superficial improvements in C&EI's current net earnings due to favorable economic conditions, but emphasized that C&EI's major problems are inherent and subject to solution only by alliance with a strong, long-haul carrier. (App. 104-109, 118-119, 180-188.)

There was no dispute about these facts at the hearings before the Examiner. Illinois Central itself emphasized C&EI's inherent defects. (I.C. Application For Control, Amendment, p. 2) Furthermore, Mr. Mathews, President of C&EI, clearly testified that C&EI's condition was the result of fundamental, built-in defects. (St., BE, pp. 17-20.) Thus, the Examiner said (App. 109):

> ". . . A reasonable appraisal supports the assertions of virtually every party to these proceedings, that Eastern presently is in a precarious financial position, and that unless means are found to reverse the trend, it may face another reorganization."

Shortly after the Examiner's Report was filed, and while the case was pending before the Commission, C&NW (*not* appellants) moved to re-open the proof in order to permit it to present C&EI financial statements for the last two quarters of fiscal 1963 which showed a slight improvement in C&EI's operating figures. Copies of these financial statements were attached to the motion.

Since the Examiner and the Commission had already studied the entire financial history of C&EI, including financial statements for the first two quarters of 1963 it is hardly surprising that the Commission concluded that

"a further hearing for the purpose stated [to show improvements in current net earnings] is not warranted." (Order, January 19, 1964.)

In its Report, subsequently filed, the Commission described C&EI as "a relatively small, financially weak, and physically deficient railroad lacking the reserve and source of ready assistance needed to successfully compete with the relatively large, well-equipped, vigorous, long-line railroads operating in the same territory, and with the increasingly dynamic carriers of the other modes of transportation." (App. 22.) The Commission reiterated this finding in its order of June 29, 1966 denying Cotton Belt's belated petition to re-open (App. C.) These decisions were within the ambit of the Commission's discretion, and do not deserve the attention of this Court. The three judge District Court affirmed the Commission's rulings. (App. 23-24.)

Moreover, C&EI, recognizing the need for and desirability of MoPac control, has filed a motion in this cause asking this Court to affirm.

V.

The Commission Properly Granted L&N the Right To Negotiate For Purchase Or Lease Of the Evansville Line.

With regard to L&N's negotiations for purchase or lease of C&EI's Evansville line, and the arguments of Monon with respect thereto, MoPac adopts the views contained in the Commission's motion to dismiss.

CONCLUSION.

For the foregoing reasons, appellee Missouri Pacific Railroad Company respectfully submits that the questions presented by appellants in these cases are not substantial and that the judgment of the court below should be summarily affirmed.

Respectfully submitted,

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November 29, 1966.

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APPENDIX

F.D. 21892
EXHIBIT No. 14-51
WITNESS; H.S. POWELL
SOUTH DAKOTA
MINNESOTA
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WYOMING
NEBRASKA
IOWA
ILLINOIS
INDIANA
OHIO
COLORADO
KANSAS
MISSOURI
KENTUCKY
W. VA.
VA.
OKLAHOMA
TENNESSEE
N. C.
S. C.
NEW MEXICO
ARKANSAS
MISSISSIPPI
ALABAMA
GEORGIA
TEXAS
LOUISIANA
FLORIDA
SIOUX FALLS
ALBERT LEA
MADISON
SIOUX CITY
ST. DODGE
WATERLOO
DUBUQUE
FREEPORT
CHICAGO
OMAHA
LINCOLN
PEORIA
SPRINGFIELD
TERRE HAUTE
INDIANAPOLIS
CINCINNATI
KANSAS CITY
ST. LOUIS
EVANSVILLE
LOUISVILLE
PUEBLO
WICHITA
COFFEYVILLE
POPLAR BLUFF
BOWLING GREEN
CORBIN
KNOXVILLE
NASHVILLE
CHATTANOOGA
FORT SMITH
MEMPHIS
JACKSON
LITTLE ROCK
ATLANTA
BIRMINGHAM
ABERDEEN
GRENADA
TEXARKANA
FORT WORTH
DALLAS
SHREVEPORT
MONTGOMERY
SELMA
EL PASO
PALESTINE
MERIDIAN
HATTIESBURG
MOBILE
CHATTAHOOCHIE
BATON ROUGE
LAKE CHARLES
PENSACOLA
HOUSTON
GALVESTON
SAN ANTONIO
LAREDO
CORPUS CHRISTI
BROWNSVILLE
LEGEND
ILLINOIS CENTRAL R. R.
CHICAGO & EASTERN ILLINOIS R. R.
LOUISVILLE & NASHVILLE R. R.
MISSOURI PACIFIC R. R.
(INCLUDING TEXAS AND PACIFIC RY.)

APPENDIX A

App. 1

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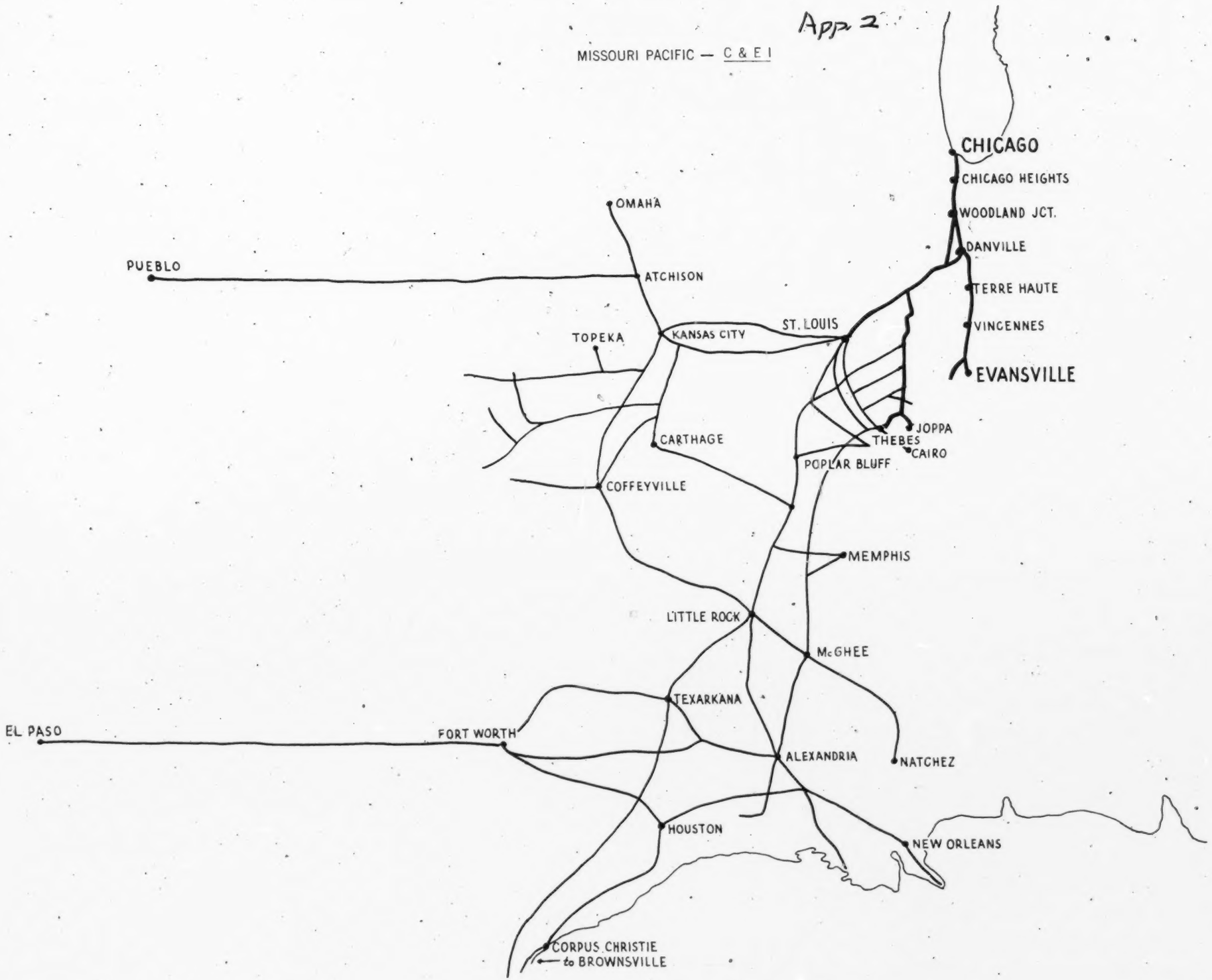
PAGE

App 2

MISSOURI PACIFIC — C & E I



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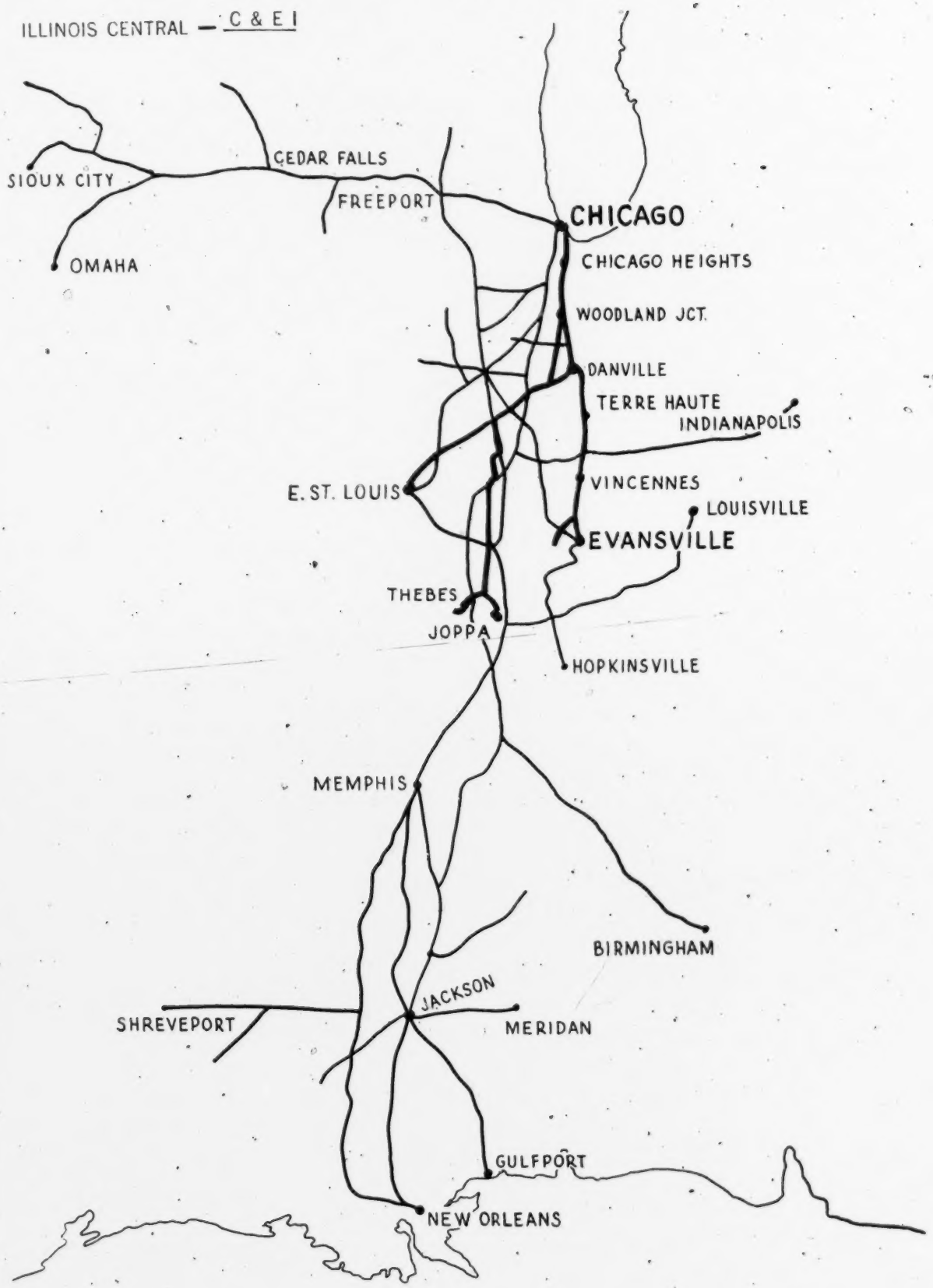
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OMAHA
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DANVILLE
TERRE HAUTE
INDIANAPOLIS
E. ST. LOUIS
VINCENNES
LOUISVILLE
EVANSVILLE
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APPENDIX B

INDEPENDENT VOTING TRUST AGREEMENT

THIS TRUST AGREEMENT, dated as of this 20th day of April, 1962, by and between MISSOURI PACIFIC RAILROAD COMPANY, a corporation organized and existing under the laws of the State of Missouri, and having its principal office at 210 North 13th Street, St. Louis 3, Missouri, (hereinafter called MoPac), and THE MARINE MIDLAND TRUST COMPANY OF NEW YORK, a banking institution organized and existing under the laws of the State of New York, and having its principal office at 120 Broadway, New York 15, New York (hereinafter called the Trustee).

WITNESSETH:

WHEREAS, MoPac has purchased and owns shares of the capital stock of Chicago & Eastern Illinois Railroad Company, an Indiana corporation (hereinafter called C&EI), such shares including shares of the Class A stock and of the common stock of the C&EI; and,

WHEREAS, MoPac may from time to time purchase, cause to be purchased, or acquire by distribution from the Company, exchange, conversion of bonds or otherwise, additional shares of C&EI; and,

WHEREAS, MoPac by such purchases of C&EI stock did not desire to acquire control or purported control of C&EI, and does not now desire to acquire such control unless and until authority to do so is granted by the Interstate Commerce Commission; and,

WHEREAS, MoPac, without admitting that its purchases and ownership of shares of the capital stock of C&EI constitute control of, or power to control, said Company, wishes to avoid any questions or charges that have

or may arise by reason of its ownership of such C&EI stocks; and to that end desires to place in trust any shares of capital stock issued by C&EI and purchased or otherwise acquired by MoPac, so that MoPac shall not be enabled, until such time as control by it of C&EI may be authorized in accordance with applicable provisions of law, to exercise any voting rights incident to any stocks of C&EI now owned or hereafter acquired by it; and,

WHEREAS, the Trustee is willing to accept a trust with respect to such shares of capital stock of C&EI as MoPac now owns, or such securities of C&EI as it may hereafter purchase or otherwise acquire.

NOW, THEREFORE, the parties hereto, in consideration of the premises and of the agreements between the parties hereto, as hereinafter contained, agree:

(1) For the purpose of vesting in the Trustee the right to vote and take other action with respect to such securities for the period and upon the terms and conditions set forth in this agreement MoPac hereby assigns, transfers and delivers to the Trustee all of its shares of voting stock of the Chicago & Eastern Illinois Railroad Company, namely, 23,600 shares of Class A stock and 74,104 shares of common stock.

Following execution of this Trust Agreement, MoPac, from time to time, (a) will cause to be transferred to the Trustee or its nominee, to be held in trust according to the terms and provisions of this Trust Agreement, any additional shares of stock issued by C&EI, including but not limited to shares of the Class A stock and of the common stock, acquired by it by purchase, distribution from the Company, exchange, conversion of any bonds of C&EI or otherwise, and (b) may deposit sums of money with the Trustee to be held by the Trustee and used for the purchase by the Trustee of additional securities of any class or type

of the said C&EI in accordance with the written direction of MoPac, such additional securities so purchased to be held in trust by the Trustee subject to the same terms and conditions as shares of stock initially deposited under this agreement, it being understood that any money so deposited and not used for the purchase of C&EI securities shall be returned to MoPac at any time upon its written request. The word "securities" as used from time to time in this agreement shall include not only the common and Class A stock initially deposited hereunder, but also any Class A or common stock, bonds or debentures issued by C&EI and deposited hereafter.

(2) Certificates for C&EI securities deposited hereunder shall be delivered to the Trustee fully endorsed for transfer, or registered in the name of the Trustee or of its nominee, with all applicable transfer taxes and fees having been paid. If and when the Trustee shall be requested or ordered to cause any securities held in this trust to be transferred or delivered for transfer, MoPac will, upon request of the Trustee, provide the Trustee with the funds required for the payment of any transfer tax and any transfer fees.

(3) The Trustee may, and shall upon the request of MoPac, issue and deliver to MoPac a certificate or certificates (hereinafter called Trust Certificates) evidencing the beneficial interest of MoPac in and to all of the securities of C&EI which are or may become subject to the provisions of this Trust Agreement, provided, that the Trustee shall not be obligated to issue any such certificate or certificates unless and until it is satisfied that the requirements of all laws applicable to the issuance and delivery thereof have been complied with at the expense of MoPac.

(4) The Trustee shall be entitled and it shall be its duty either in person or by proxy, with full power of substitu-

tion, to vote or cause to be voted, or to assent, or decline to assent, in respect of, securities of C&EI deposited hereunder of which it shall have become record holder prior to any applicable record date unless otherwise directed by a court of competent jurisdiction; provided however that the Trustee shall not vote or assent in respect of any such securities for the acquisition of control of C&EI by MoPac or by any other company except as may be permitted or authorized by the Interstate Commerce Commission or required by a court of competent jurisdiction.

The Trustee will exercise the voting power of C&EI securities and will exercise its best judgment from time to time in voting for the election of suitable directors to the end that the affairs of C&EI shall be properly managed, and in voting and in acting on other matters which may come before it as stockholder or bondholder or at any meeting of the stockholders or bondholders will exercise like judgment.

The Trustee shall vote the securities of C&EI so that at all times during the continuance of this Trust Agreement there shall, to the best of its knowledge, be entire independence of directors and management between MoPac and C&EI, and the Trustee shall not exercise the voting power of said securities of C&EI in such way as to its knowledge cause any dependence or intercorporate relationship between said two companies; and particularly it shall not, without the consent of the Interstate Commerce Commission, to its knowledge vote so that any officer or director of MoPac, or any corporation controlled by MoPac, shall be elected an officer or director of C&EI or its controlled subsidiaries; provided, however, that this paragraph is not intended, nor shall it be construed to prevent the Trustee from voting said shares of capital stock when necessary for the approval of such operating, engineering, traffic arrangements or other agreements as are customary and

desirable between railroads, nor of such trackage or other contracts as may be agreed upon between the MoPac, or its controlled subsidiaries, and the C&EI or its controlled subsidiaries, if such arrangements, agreements, or contracts may not, so far as the Trustee knows, substantially lessen competition or may not, so far as the Trustee knows, restrain commerce.

(5) In the event that MoPac shall pledge any certificates evidencing MoPac's beneficial interest in securities deposited under this Trust Agreement to anyone other than an affiliate of MoPac, (ascribing to the term "affiliate" the meaning specified in Section 5(6) of the Interstate Commerce Act), and the terms of such pledge shall entitle the pledgee to vote and give consent with respect to the securities represented by the pledged Trust Certificates if any stated event of default shall occur, then upon the occurrence and during the continuance of any such event of default, the Trustee, upon being satisfied of the occurrence and continuance of such event of default, shall vote the securities represented by such Trust Certificates, or otherwise act in respect thereof, in accordance with the written directions of the pledgee, the terms of paragraph (4) hereof to the contrary notwithstanding; provided, however, that the Trustee shall not accept any instruction of a pledgee if, to Trustee's knowledge, for such pledgee to vote would constitute a violation of Section 5 of the Interstate Commerce Act. The Trustee shall be entitled to act and rely upon a certificate of MoPac that MoPac has pledged Trust Certificates in the manner and upon the terms hereinabove described, naming the pledgee and specifying the number (or face amount in the case of bonds) and class of securities represented by the pledged Trust Certificates, and the Trustee shall be entitled to act and rely upon the certificate of the pledgee named therein (signed, in the case of individual pledgee or pledgees by

the pledgee or pledgees named, and in the case of a corporate pledgee, by the President or any Vice President and by the Secretary or Assistant Secretary thereof) that the event of default entitling the pledgee to vote and give consents with respect to the securities represented by the pledged Trust Certificates has occurred and is continuing.

(6) Pending the termination of this trust as hereinafter provided the Trustee shall be entitled to receive all cash dividends that may be declared and paid upon any of the aforesaid shares of capital stock of C&EI and shall immediately pay the same to MoPac; and in like manner the Trustee shall receive and pay to MoPac any interest paid upon any bonds or debentures that may at any time be deposited with it. All dividends which may be declared and be payable in securities of the C&EI shall be received and held by the Trustee upon the same terms and conditions as is the right, title and interest of MoPac in the aforesaid shares of stock of C&EI deposited in this trust, and subject to all the terms, conditions and agreements as herein provided with respect to the aforesaid shares. In like manner, as to any securities of C&EI deposited in trust with the Trustee, if such securities, or any of them, are converted or exchanged into shares of stock or other securities of C&EI in accordance with any conversion or exchange privilege, the resulting shares of stock or other securities shall be held subject to all the terms, conditions, and agreements as herein provided.

(7) The Trustee shall be entitled to reasonable compensation for all services rendered by it as Trustee under the terms hereof, and said compensation to the Trustee, together with such counsel fees, taxes, or other expenses reasonably incurred hereunder or in connection with the creation or defense of this voting trust, shall be promptly paid by MoPac.

The Trustee may at any time or from time to time appoint an agent or agents and may delegate to such agent or agents the performance of any administrative duty of the Trustee.

The Trustee shall not be answerable for the default or misconduct of any agent or attorney appointed by it in pursuance hereof if such agent or attorney shall have been selected with reasonable care; nor shall the Trustee be answerable or liable for anything whatever in connection with the trust except for its negligence or wilful misconduct. MoPac agrees that it will at all times protect, indemnify and save harmless the Trustee from any loss, cost or expense of any kind or character whatsoever in connection with this trust except that, if any, growing out of the negligence or wilful misconduct of the Trustee; and MoPac will at all times itself undertake and assume full responsibility for and pay all cost and expense of any suit or litigation of any character, including any proceedings before the Interstate Commerce Commission, with respect to said securities of C&EI or this Trust Agreement; and if the Trustee shall become a party thereto MoPac will pay all costs and expenses, including counsel fees, to which the Trustee may be subjected by reason thereof.

The Trustee may consult with counsel and the opinion of such counsel shall be full and complete authorization and protection in respect of any action taken or omitted or suffered by the Trustee hereunder in good faith and in accordance with such opinion. The Trustee, in its individual or any other capacity, may become the owner or pledgee of any class of stock or of any bonds, debentures or other securities of C&EI, and may engage in any and all banking activities with or for C&EI with the same rights it would have if it were not the Trustee hereunder.

The Trustee, or any trustee hereafter appointed, may at any time resign by giving written notice of resignation to MoPac. Upon receiving such notice of resignation MoPac shall promptly appoint a successor trustee which shall be a corporation organized and doing business under the laws of the United States or of any state thereof authorized under such laws to exercise corporate trust powers, having a combined capital and surplus of at least $10,000,000, and subject to supervision or examination by Federal or State authority. If no successor trustee shall have been appointed and shall have accepted appointment within 30 days after such notice of resignation, the resigning Trustee may petition any authority or court of competent jurisdiction for the appointment of a successor trustee.

(8) This trust is accepted by the Trustee subject to the right hereby reserved in MoPac at any time to sell or make other disposition of the whole or any part of any deposited securities of C&EI to anyone other than an affiliate of MoPac, ascribing to the term "affiliate" the meaning specified in Section 5(6) of the Interstate Commerce Act. The Trustee will at any time upon the receipt of direction from MoPac, signed by its President or one of its Vice Presidents and under its corporate seal, stating the person or corporation to whom it has sold or otherwise disposed of the whole or any part of the aforesaid securities of C&EI and that such person or corporation is not an affiliate of MoPac and has full power and authority to acquire the same (upon which statement the Trustee shall be entitled to rely), immediately transfer to the person or corporation therein named all of the Trustee's right, title and interest in such amount of said securities as may be set forth in said direction. If said direction shall specify all of the aforesaid securities then remaining subject hereto, then upon transfer of the Trustee's right, title, and in-

terest therein, and upon payment to the MoPac of the proceeds of sale as hereinafter in this paragraph provided, this trust shall cease and come to an end; and if said direction is as to only a part of the deposited securities, then this trust shall cease as to said part but shall remain in full force and effect as to the remaining part of said securities.

The Trustee shall promptly pay to MoPac the net proceeds of any sales of C&EI securities made by MoPac.

(9) MoPac has applied to the Interstate Commerce Commission for authority under Section 5(2) of the Interstate Act to acquire control of the C&EI and said Application is now pending in Finance Docket No. 21755. MoPac will promptly advise the Trustee of any interventions or representations in said proceeding affecting or related to this Trust Agreement, and of the making by the Interstate Commerce Commission of any final order in said proceeding.

If and when MoPac shall be authorized by order of the Interstate Commerce Commission to acquire control of C&EI, or to purchase the properties, or any part thereof, of C&EI, or to cause C&EI or its properties, or any part thereof, to be leased, consolidated, merged or otherwise to become a part of the system of MoPac, either directly or indirectly, or if and when the Interstate Commerce Commission shall approve or authorize a release of the securities held hereunder for any reason whatsoever, then immediately upon the delivery of a certified copy of the order of approval or authorization of the Interstate Commerce Commission, and an opinion of counsel that such order is final and effective, the Trustee shall transfer to MoPac its right, title and interest in and to all of the deposited securities of C&EI, or as to such part thereof as shall have been deposited with it to be held by it in accordance

with the terms, conditions, and agreements of this instrument and not transferred by it as elsewhere provided, and upon such transfer this trust shall cease and come to an end.

(10) Unless sooner terminated pursuant to any other provisions herein contained, this Trust Agreement shall terminate on April 20, 1972. All securities and other property held by the Trustee upon such termination shall be distributed to or upon the order of MoPac.

(11) The Trustee accepts the trust as in this Trust Agreement set forth and agrees to execute the trust upon the terms and conditions hereof.

(12) This Agreement may from time to time be modified or amended except that (a) no amendment or modification may be made which would affect the independence of the Trustee in the voting of, or exercising other rights in relation to, the deposited securities, or which would permit MoPac to terminate the trust or otherwise acquire record title or voting rights to any deposited securities other than as set forth in this Agreement, and, (b) any amendment or modification enlarging the duties or affecting the liabilities of the Trustee shall be approved by the Trustee. Any such modification or amendment shall be manifested by written instrument signed by MoPac and the Trustee and filed by MoPac with the Trustee and the Interstate Commerce Commission. Any such amendment shall be accompanied by the requisite authority of the Interstate Commerce Commission or an opinion of counsel that such authority is not necessary.

(13) The terms used in this Trust Agreement shall, as far as applicable, be given the definitions set forth in Part I of the Interstate Commerce Act.

(14) MoPac, by the execution of this Agreement, represents that it is a duly organized and existing corporation

in good standing under the laws of the State of Missouri; that it has full power and authority under the laws of the State of Missouri and the Company's Charter and By-Laws to execute and enter into this Agreement; and that the same has been duly authorized and no further approval or authority is necessary.

(15) This Trust Agreement is executed in triplicate, each of which shall constitute an original, and one of which shall be retained by MoPac, the second of which shall be held by the Trustee, and the third of which shall be lodged with C&EI by MoPac in order that it may be apprised of the rights and authority of the Trustee.

IN WITNESS WHEREOF, the MISSOURI PACIFIC RAILROAD COMPANY has caused this Trust Agreement to be executed by its President, and its corporate seal to be affixed, attested by its Secretary, and THE MARINE MIDLAND TRUST COMPANY OF NEW YORK has caused this Trust Agreement to be executed by its Vice President and its corporate seal to be affixed, attested by its Assistant Secretary the day and year first above written.

Missouri Pacific Railroad Company

By .....
President

Attested:

.....
Secretary

The Marine Midland Trust Company
of New York

By .....
Vice President

Attested:

.....
Assistant Secretary

APPENDIX C

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C. on the 23rd day of June, 1966.

Finance Docket No. 21755

MISSOURI PACIFIC RAILROAD COMPANY — CONTROL—CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY.

Finance Docket No. 21892

ILLINOIS CENTRAL RAILROAD COMPANY — CONTROL—CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

Finance Docket No. 21980

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

Upon consideration of the record in the above-entitled proceedings, the petition for leave to file a petition for reopening, further hearing and reconsideration filed by the St. Louis Southwestern Railway Company on May 4, 1966, together with a petition for reopening, further hearing and reconsideration proffered the same date with respect to the Commission's report and order of February 16, 1965, and its order of August 6, 1965, and to the replies to said petitions filed by Leon Leighton and jointly by the Louisville and Nashville Railroad Company and the Missouri Pacific Railroad Company; and

It appearing, That, insofar as the petitioner cites the application to purchase the properties of the Alton & South-

ern Railroad Company filed by the Missouri Pacific Railroad Company, in opposition to the petitioner's application for the same authority, as grounds for the relief sought in the proffered petition—the effect upon petitioner of such acquisition by Missouri Pacific can be determined in the consolidated proceeding upon both applications required by the Commission's order of May 31, 1966, in Finance Dockets Nos. 23935, 24075, and 24148; and that insofar as the petitioner relies on the improved financial condition of the Chicago & Eastern Illinois Railroad Company since the report and order of February 16, 1965—the petitioner filed no exception to the hearing examiner's report in these proceedings—if any change in general economic conditions, the financial condition of particular carriers, or the stock market would require reopening of proceedings such as this, it is unlikely that any proceeding involving a significant proposal for railroad unification would ever be completed, *I. C. C.* v. *Jersey City*, 322 U.S. 503 (1944)—and the alleged recent short-term improvement in the financial condition of the Chicago & Eastern Illinois Railroad Company is insufficient to warrant reconsideration of the Commission's conclusion, based on the long-term history of the carrier, that its affiliation with a stronger railroad will be consistent with the public interest.

It further appearing, That sufficient cause has been shown for filing the petition for reopening, further hearing and reconsideration but that the relief sought in said petition is not warranted on the basis of the circumstances alleged in support thereof; cf. *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 486:

It is ordered, That the petition for reopening, further hearing and reconsideration be, and it is hereby, filed; and that said petition be, and it is hereby, denied.

By the Commission.

H. Neil Garson,
Secretary.

(SEAL)

Service date.—June 29, 1966.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

Nos. 687, 688, 689

ILLINOIS CENTRAL RAILROAD COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY AND MONON RAILROAD,

Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

LEON LEIGHTON,
6 East 45th Street,
New York, N. Y. 10017,
Attorney Pro Se.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NOS. 687, 688, 689

ILLINOIS CENTRAL RAILROAD COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY and MONON RAILROAD,
Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM [1]

Pursuant to Rule 16, paragraph 1(c), of the Rules of this Court, the undersigned appellee [2] joins in the motions

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[1] The parties will be identified as in the District Court opinion: Eastern for Chicago and Eastern Illinois Railroad Company; IC for appellant Illinois Central Railroad Company; Cotton Belt for appellant St. Louis Southwestern Railway Company; Monon for appellant Monon Railroad; MoPac for appellee Missouri Pacific Railroad Company; L&N (called "Dixie Line" by the Commission) for appellee Louisville and Nashville Railroad Company.

Initialled references are to the respective jurisdictional statements and motions to affirm. References captioned "J.S." are to Appendices 1 and 2 to appellants' jurisdictional statements. References captioned "Tr." and "Ex." are to the Commission's transcript and exhibits. References captioned "Doc." are to the documents in the District Court record, which has been filed in this Court.

[2] The undersigned is a stockholder of Eastern, who participated throughout the Commission proceeding (J.S. 35a), and intervened in the District Court in support of the Commission's order (J.S. 1a).

of the other appellees that the judgment of the District Court be affirmed. This motion adopts the statements of appellees Commission and MoPac; and will not repeat arguments fully treated by them.

The Commission's Conclusions

The Commission concluded:

1. "Eastern's preservation as a prosperous competitive rail carrier under the control of Missouri Pacific . . . is clearly in the public interest—certainly far more so than would be its eventual subjugation and disintegration under the control of Illinois Central . . . or its continued operation as a self-restricted, financially weak system as at present" (J.S. 91a);

2. "Approval of the Illinois Central plan would deny to shippers and receivers in the Southeast and in the Southwest a vastly improved direct-line service to and from the Chicago gateway for which this record contains abundant evidence of need" (J.S. 45a);

3. "Of paramount importance in these deliberations is the impact our decision will have upon the public interest. * * * To deny Eastern the relief and assistance offered through the several proposals now before us, would leave it foundering and of diminishing value to either the public generally or to its own security holders. Twice since the turn of the century Eastern has had to be rescued from bankruptcy by a reorganization—in 1922 and again in 1941; and now, in these proceedings we have the opportunity to approve remedial proposals capable of preventing a

recurrence, at least in the foreseeable future" (J.S. 90a-91a);[3]

4. "Even though we find a statutory violation through the unlawful acquisition of control, we are not free to summarily deny Missouri Pacific's application. For, in carrying out the duty imposed upon us by law, we must necessarily make an appraisal of the whole case, and thereupon determine that disposition which would best serve the public interest. *A violation of section 5(4) does not automatically defeat a transaction.** If overriding public interest considerations are plainly evident, they are not to be rejected merely for the sake of returning the wrongdoer to the status quo ante; but should be recognized as justifying approval of the transaction. In our opinion, the public interest considerations in these proceedings overwhelmingly favor approval of Missouri Pacific's control of Eastern subject to conditions for inclusion of Dixie Line, notwithstanding the section 5(4) violation" (J.S. 89a-90a).

The District Court's Conclusion

The District Court adhered to this Court's mandate that "the function of the reviewing court . . . is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done" (*U.S.* v. *Pierce Auto Lines,* 327 U.S. 515, 536 [1946]) (J.S. 15a).

---

[3] The Examiner reported that, under MoPac's estimates, as to which "there is sufficient validity . . . to be accorded full consideration in the determination herein" (J.S. 180a), from and after about the fifth year of operation under common control, Eastern's net railway operating income (before Federal income taxes) would be increased by $6.1 millions (J.S. 127a). This is 2.7 times Eastern's average for the five-year period 1961-5. See Moody's Transportation Manual (1966), p. 159.

* Unless otherwise indicated, all italics are supplied.

This mandate is especially applicable to railroad control and merger cases.

In *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U. S. 173 (1959), this Court approved the Commission's order awarding joint control of Toledo, Peoria & Western Railroad to Pennsylvania and Santa Fe, in preference to the competing bid of Minneapolis & St. Louis. The Court (at pp. 187-8) repeated with approval the following language from *McLean Trucking Co.* v. *U. S.,* 321 U. S. 67, 87-8 (1944):

> "Resolution of the conflicting considerations 'is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission' . . . 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed [acquisition] is 'consistent with public interest.'"

This reliance on the Commission's "expert judgment and considerable knowledge of the transportation industry," which led to affirmance of Commission approval of control or merger in the two foregoing cases, induced similar affirmances in every other case of judicial review of such Commission orders approving railroad control or merger applications.[4] The Court is respectfully referred to the opinions in *Minneapolis & St. Louis, supra*; and in the Spokane International case (*Canadian Pacific Railway Co.* v. *United States,* 158 F. Supp. 248 [D. Minn. 1958]), in both of which the Commission likewise favored an "end-to-end" over a "side-by-side" relationship (see J.S. 2a), because the latter would result in disemployment of many persons, in destruction of competition, and in abandonment of lines.

---

[4] See cases in Appendix.

ARGUMENT

1. There is warrant in the law and the facts for the Commission's conclusion that the public interest considerations overwhelmingly favor approval of MoPac control of Eastern, notwithstanding the Section 5(4) violation.

2. There is warrant in the law and the facts for the Commission's refusal to reopen to receive evidence of Eastern's current financial condition.

3. Monon's complaint is premature.

POINT 1

There is warrant in the law and the facts for the Commission's conclusion that the public interest considerations overwhelmingly favor approval of MoPac control of Eastern, notwithstanding the Section 5(4) violation.

A. The Commission's Balancing Test

Having made the uncontroverted and uncontrovertible finding that the public interest would best be served by authorizing MoPac's control of Eastern (see J.S. 4a), "[t]he Commission applies a balancing test" (District Court opinion, J.S. 6a). "While § 5(2) directs Commission approval of a proposed control transaction if it will be 'consistent with the public interest,' § 5(4) declares it unlawful to enter into such a transaction without § 5(2) approval. Denial of a § 5(2) application because of a § 5(4) violation may deprive the public of important transportation benefits; approval of a § 5(4) *fait accompli* rewards the lawbreaker. The Commission is not a stranger to this dilemma" (*ibid.*, 5a).

Appellants urge as two "substantial" questions requiring answers by this Court:

(a) Whether the Commission must consider the merits of a railroad control application even though the applicant has already violated Section 5(4), "or whether in such circumstances it has the *power* to deny the application . . . solely on the ground of the antecedent violation" (IC 4; CB 5);

(b) Whether the Commission's conclusion, that the Section 5(4) violation was outweighed by public interest considerations under Section 5(2),[5] "was correct as a matter of law and rested upon adequate findings, supported by substantial evidence" (IC 4; CB 4-5).

B. The Commission's Power and Responsibility

The Commission does not need a judicial pronouncement on the subject of its power. The Commission knows that it has power to deny an application for control because of a violation of § 5(4), and exercised it in the *Central of Georgia* case by denying Frisco's application because its violation outweighed the public benefits of the proposal in that case (J.S. 5a-6a; see also 307 I.C.C., at pp. 39-41). This Court has already confirmed "the principle recently stated by the Commission in *Central of Georgia R. Co. Control,* 307 I.C.C. 39, 43, that a § 5(4) violation may alone bar approval of a merger *unless, 'upon consideration of all the facts, it clearly appears that the public interest will be served best by such approval'*" (*Gilbertville Trucking Co.* v. *U.S.,* 371 U.S. 115, 128 [1962]).

What the Commission meant in saying "we are not free to summarily deny Missouri Pacific's application" because of the statutory violation (IC 4, 11, 14-16, 18; CB 5, 9, 16-17; but *cf.* complete context of Commission's Report, p. 3, *supra*) is that it was not free to abdicate its "heavy re-

---

[5] "The congressional purpose in the sweeping revision of § 5 of the Interstate Commerce Act in 1940, enacting § 5(2)(a) in its present form, was to facilitate merger and consolidation in the national transportation system" (*County of Marin* v. *United States,* 356 U.S. 412, 416 [1958]).

sponsibility to tailor the remedy to the particular facts of each case so as to best effectuate the remedial objectives" of Section 5(4) (*Gilbertville, supra,* at p. 130); nor its statutory function "to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies" (*U. S.* v. *Detroit Navigation Co.*, 326 U.S. 236, 241 [1945]). The Commission is charged with the same duty of applying a balancing test here as it has when a proposed merger may impinge on antitrust principles,—something at least as offensive to public policy as a violation of § 5(4).[6]

C. The Commission's Application of the Balancing Test, Affirmed by the District Court, Does Not Present a Substantial Question

In *Alamo Express, Inc.* v. *United States*, 239 F. Supp. 694 (W.D. Tex. 1965), affd. 382 U.S. 19 (1965), the District Court said (p. 696):

> ". . . [T]he Commission concluded that the control and management of INLAND in a common interest with CENTRAL had been effectuated and was in violation of Section 5(4) of the Act and had continued until September 5, 1961, when terminated by the grant of temporary control authority. The violation, however, was found not to be such as to preclude CENTRAL as being unfit to control INLAND, nor so aggravated as to prevent approval in the control case, *if it could otherwise be found to be consistent with the public interest*" (italics in original).

[6] "In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy" (*McLean Trucking Co.* v. *U. S., supra,* 321 U.S. 67, 87 [1944]). See also *Seaboard Air Line R. Co.* v. *U. S.*, 382 U.S. 154, 156-7 (1965).

The control in that case was found to have been actually effectuated and to have persisted since December 1, 1957 (nearly four years) (90 M.C.C., at pp. 787-8). Contrast this with the case at bar, where actual control had never been effectuated and when the violation lasted for only eight months (J.S. 3a).

With the issue clearly focused by appellants' jurisdictional statement which made many of the arguments urged by appellants herein,[7] this Court granted the motion to affirm.

The Commission similarly granted control applications in seven other motor carrier cases despite § 5(4) violations by the respective applicants. *Atlantic Transp. Co.-Control and Merger,* 56 M.C.C. 329, 340 (1950); see cases cited in J.S. 6a; and in *L. Nelson & Sons Transp. Co.-Control and Merger,* 80 M.C.C. 257, 265 (1959). *Central of Georgia* and the instant case are the only railroad control applications wherein the issue was squarely adjudicated by the Commission.[8] In *Gilbertville Trucking Co.* v. *U.S., supra,* after discussing the Commission's rule in *Central of Georgia,* this Court said (371 U.S. 105, at p. 129): "In fact, *the Commission's rule is not automatic and will give way to a clear showing of public interest in approval.*"[9]

---

[7] "* * * The approval of the instant transaction was to 'bless' the 'reckless and flagrant disregard for the Commission's authority,' and does not comport with the general rule announced by the Commission" (pp. 22-3).

[8] "The Commission was correct in saying that 'unlike the flagrant disregard for the law which characterized the situation in *Central of Georgia Ry. Co. Control,* 307 I.C.C. 39 (1958), there are in the present record a number of factors mitigating the unlawful conduct'" (District Court opinion, J.S. 14a-15a).

[9] The fact that the Civil Aeronautics Board adopts a Draconian automatic rule (IC 16-17, 22-3) is totally immaterial. The Interstate Commerce Commission is entrusted with the responsibility of regulating rail and motor carrier transport, in which it has the expertise; it is not required to apply in its field the principles which the Civil Aeronautics Board finds appropriate in the exercise of its expertise in air transport.

The District Court here was clearly right in affirming the Commission's application of the balancing test (J.S. 16a). IC and Cotton Belt in effect ask the Commission to punish *Eastern and the public* for MoPac's violation,—which was effectively corrected within eight months, and which did no harm to Eastern or to the public interest during its short duration. Eastern is to be punished, either (a) by being kept independent, which "would leave it foundering and of diminishing value to either the public generally or to its own security holders" (J.S. 91a); or (b) by placing it under IC domination, where "Eastern would be so restricted in its conduct of its own operations that, in the event such domination were to be terminated, voluntarily or otherwise, the reestablishment of Eastern as an independently operated carrier would be entirely impracticable, if not impossible" (J.S. 44a). The public is to be punished by denying "to shippers and receivers in the Southeast and in the Southwest a vastly improved direct-line service to and from the Chicago gateway for which this record contains abundant evidence of need" (J.S. 45a).

POINT 2

There is warrant in the law and the facts for the Commission's refusal to reopen to receive evidence of Eastern's current financial condition.

Appellants argue that a "substantial" question is presented by the Commission's refusal to reopen the record to receive evidence concerning "the significant improvement in the financial and operational health of [Eastern] whose debility as depicted in the stale record on which the Commission's decision was based underlay the Commission's conclusion that absorption of [Eastern] by another railroad [MoPac] would be in the public interest" (IC 5, 32-3; CB 5, 19-20). Chief Judge Campbell's dissent accepted this argument (J.S. 32a).

The Commission's refusal to reopen was based upon the finding in its order of June 29, 1966 that "the alleged

recent short-term improvement in the financial condition of [Eastern] is insufficient to warrant reconsideration of the Commission's conclusion, based on the long-term history of the carrier, that its affiliation with a stronger railroad will be consistent with the public interest''.

". . . [I]t has been held consistently that rehearings before administrative bodies are addressed to their own discretion. *Interstate Commerce Commission* v. *Jersey City, supra* [322 U.S. 503 (1944)]. *Only a showing of the clearest abuse of discretion could sustain an exception to that rule''* (*U. S.* v. *Pierce Auto Lines,* 327 U.S. 515, 535 [1946]).[10]

The evidence tendered by appellants (IC 32-3; CB 19-20) is contained in Cotton Belt's petition to reopen (Doc. No. 46), which cites certain facts in Eastern's 1965 Annual Report to the Commission (pp. 5-7). But this very report emphasizes the validity of the Commission's reiteration of its conclusion "that [Eastern's] affiliation with a stronger railroad will be consistent with the public interest."

---

[10] "Administrative consideration of evidence—particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it—always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening" (*Jersey City, supra,* 322 U.S., at p. 514).

"Appellees also insist that a new hearing be held so that evidence of 'present conditions' could be presented to the Commission rather than 'speculation.' It is true that this case has been pending for 10 years but this, rather than being a reason for holding additional hearings, operates to the contrary" (*United States* v. *Norfolk and Western Railway Co.,* No. 20, decided Nov. 14, 1966, slip opinion, pp. 17-18).

That report contains the following Balance Sheet as of the close of 1965 (Doc. No. 48, p. 7):

Current Assets	
Cash	$ 4,018,058
Accounts receivable	4,709,283
Materials and supplies	2,618,189
Other current assets	96,789
Total current assets	$11,442,319
Current Liabilities	
Accounts payable	$ 5,937,038
Payroll and vacation pay	1,605,123
Taxes	1,353,654
Other	373,698
Total current liabilities	$ 9,269,513
Long-term debt due within one year	3,380,024
Total Current Liabilities, including long-term debt due within one year	$12,649,537

Obviously materials and supplies, while treated as current assets under the Commission's accounting procedures, cannot be used to meet a payroll or other operating expenses. Eliminating this leaves $8.8 millions of current assets to meet current liabilities and long-term debt due within one year aggregating $12.6 millions.

Cotton Belt's petition emphasizes Eastern's issue of new common stock in 1965, and the rise in the price of its common stock since 1961 (Doc. No. 46, pp. 7-8). But the vagaries of the market place are no substitute for the expertise of the Commission.

In Statement BE, the verified testimony of Eastern's President filed with the Commission and made a part of its record, he detailed the inherent weaknesses which brought Eastern to its present precarious financial condition, and

which have not been and cannot be cured by one or a few years of improved earnings:

> "a. Location in an area abundantly served by transportation agencies (p. 12);
>
> b. Higher terminal costs of small railroads (p. 17);
>
> c. Greater impact of wage increases and labor working rules on small railroads because of intense competition (p. 19);
>
> d. Higher cost of sales in relation to revenue (p. 17);
>
> e. Lack of an adequate and flexible car supply (p. 18);
>
> f. Tendency of shippers to locate new plants on large railroads serving existing plants (p. 18);
>
> g. Tendency of shippers to favor large railroads which can reciprocate by substantial purchases (p. 18)."

Atchison, T. & S. F. R. Co. v. *United States*, 284 U.S. 248 (1932), the case relied on by appellants (IC 33-4; CB 20-1), has no application to the facts at bar. "That case, as has been indicated more than once, was 'promptly restricted . . . to its special facts, *United States* v. *Northern Pacific Ry. Co.*, 288 U.S. 490, and it stands virtually alone' " (*Pierce Auto Lines, supra*, 327 U.S., at pp. 534-5).[11]

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[11] *Great Lakes Airlines* v. *CAB*, 294 F. 2d 217, 228 (D.C. Cir. 1961), cert. den. 366 U.S. 965 (1961), and *Braniff Airways, Inc.* v. *CAB*, 147 F. 2d 152, 153 (D.C. Cir. 1945) (IC 34), have nothing to do with an alleged improvement in financial condition. In those cases, the Civil Aeronautics Board, having denied licenses because of lack of qualification of applicants' owners, was held to have abused its discretion in refusing to reopen to admit evidence of change of ownership.

Applicable here is the pronouncement in *I.C.C.* v. *Jersey City*, 322 U.S. 503 (1944), where the Court said, per Jackson, J. (p. 517): "We have rejected the plea of railroad stockholders that events subsequent to approval of a reorganization plan of a very similar character to those alleged here, require its return for consideration. *Group of Institutional Investors* v. *Chicago, M. St. P. & P. R. Co.*, 318 U.S. 523, 542-44; *Ecker* v. *Western Pacific R. Co.*, 318 U.S. 448, 506-9." Yet the estimates of future earnings based on the records in those cases have been used by the Commission, with the approval of this Court, as the basis for liquidating large portions of debt, as well as stock interests, despite the claim that the failure to consider substantial increases in earnings since the record was closed violates due process. See Frankfurter, *J.*, dissenting, in *Insurance Group* v. *D. & R. G. W. R. Co.*, 329 U.S. 607, 621, *et seq.* (1947); *Cf. Western Pacific, supra,* 318 U.S., at pp. 475-7; *Milwaukee* case, *supra,* 318 U.S., at pp. 536-9.

Those cases would apply *a fortiori* here, where the effect of the Commission's finding is to permit Eastern to "have access to revitalizing resources outside of itself [essential], if it is to survive as a positive and contributing element of the national transportation system" (J.S. 91a). The Commission did not have to find that Eastern was already on the courthouse steps. *Broth. of Maintenance of Way Employees* v. *United States;* 221 F. Supp., 19, 22, 30 (E.D. Mich. 1963), affd. 375 U.S. 216 (1963).

POINT 3

Monon's complaint is premature.

The Commission concluded that "[w]e would be derelict in our responsibility to serve the public interest, if, in the face of this record, we failed to provide Dixie Line an *opportunity* to acquire the Evansville line . . .; the operation of [which] by Dixie Line would be consistent with the

public interest" (J.S. 57a). Accordingly, the Commission's order requires MoPac, upon assuming control, immediately thereupon to "take all reasonable, necessary and appropriate steps to cause Eastern to negotiate in good faith for the sale to Dixie Line" of the Evansville Line (J.S. 67a).[12]

MoPac has accepted that condition. Whether or not the parties agree on the terms of acquisition, § 5(2) requires that the Commission must approve the transaction, and the order specifically provides that L&N would have to make such an application (J.S. 68a).[13]

Monon's attack on the L&N condition does not present a substantial question (see Mon 3-4).

First, judicial review at this time would be premature. There is no assurance at this time that L&N will ever make such application.[14] There is a wide divergence between the

---

[12] The Commission had to make the foregoing finding of public interest in order to incorporate the condition for compulsory negotiation, and the reservation of jurisdiction to enforce it (J.S. 25a-26a). See *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line*, 320 I.C.C. 122, 186-8, 268-9 (1963), affd. *Florida East Coast Ry. Co.* v. *United States* (M.D. Fla. June 6, 1966); *Norfolk & Western Railway Co. and New York, Chicago & St. Louis Railway Co.—Merger*, 324 I.C.C. 1, 28, 148 (1964); Note, 63 Mich. L. Rev. 543 (1965).

[13] The order also directs that necessary steps be taken to grant L&N trackage or joint use rights, pending final determination of its acquisition. Monon alleges possible injury from such a temporary grant (Mon 9).

The complete answer is L&N's unequivocal statement that it will not apply for interim trackage or joint use rights (L&N 10 fn.). If it did, Commission approval would still be required. § 5(2)(a)(ii); *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, 146-8 (1946).

[14] The allegation that "control of the C&EI by MoPac would be authorized if, and only if, the L&N operates through trains over the C&EI's Evansville-to-Chicago line" (Mon 6, 13) is not supported by the cited portions of the report (J.S. 67a-68a, 92a). "The conditions requested by Dixie Line would be mandatory only in the sense that good faith negotiations would be required. However, . . . they would not make it mandatory that the negotiations be successful and the acquisition be accomplished" (J.S. 56a). See also District Court opinion (J.S. 26a).

parties regarding the value of the Evansville line (*cf.* Exs. H-179 and H-147 with Tr. 3325 and 3870). And L&N's president stated unequivocally that he was "not willing to let any outside agency such as the Commission or arbitrators fix a reasonable price" (Tr. 2975-6),—a position reiterated by its counsel at oral argument before the Commission (Tr. 5901-2). See also L&N 14.

In short, the condition directing compulsory negotiations for sale of the Evansville line to L&N is an "iffy" condition, which had to be imposed in the instant order to retain the Commission's jurisdiction, but which may never hurt Monon,—either because the Commission may not approve a price agreed on by MoPac and L&N, or because the latter may not agree to the price fixed by the Commission, or because the Commission may find that the injury to Monon outweighs the public benefits of the sale, or because the Commission may impose conditions which Monon finds to be adequate protection.

"The concurrence of these contingent events, necessary for injury to be realized, is too speculative to warrant anticipatory judicial determination" (*Eccles* v. *Peoples Bank*, 333 U.S. 426, 432 [1948] [Federal Reserve Board]). "Inasmuch as petitioners have lost nothing and have had imposed upon them no obligation by the board's direction to the [Railway Express] [15] and no final order has been entered, we think that no right of petitioners to complain has matured" (*American Airlines* v. *Civil Aeronautics Board*, 178 F. 2d 903, 910-11 [7 Cir. 1949]; *cf. Railway Express Agency, Inc.* v. *C.A.B.*, 345 F. 2d 445 [D.C. Cir. 1965], cert. den. 382 U.S. 879 [1965]). See, to the same effect, *Sunray Mid Continent Oil Co.* v. *Federal Power Com'n*, 270 F. 2d 404, 407 (10 Cir. 1959).

Secondly, if on L&N's subsequent § 5(2) application the Commission does direct sale to it of the Evansville line,

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[15] The Board had directed Railway Express to negotiate revised air express agreements with petitioner air lines and to submit such revised agreements to the Board within six months (p. 910).

the Commission would not confine itself to "approv[ing] the details of said acquisition" (Mon 3, 7-8). In order to make the finding that the sale to L&N will be consistent with the public interest, the Commission would have to evaluate its competitive effect on Monon (see Mon 10-12).[16] "Monon will have ample judicial protection if and when the final L&N § 5(2) application for purchase of the Evansville line is approved by the Commission. Monon can raise its objections at that time" (District Court opinion, J.S. 26a-27a).

"* * * [F]inal agency action for which there is no other adequate remedy in a court [is] subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action" (5 U.S.C. § 704).

In *Continental Bank and Trust Company* v. *Martin*, 303 F. 2d 214 (D.C. Cir. 1962), the Bank had been admitted to the Federal Reserve System in 1952, subject to the express condition that "the net capital and surplus funds of such bank shall be adequate in relation to the character and condition of its assets and to its deposit liabilities" (p. 215). In accordance with this condition, the Board, on July 18, 1960, ordered the Bank to increase its capital and surplus by not less than $1,500,000 within six months.

The Bank filed suit for a declaratory judgment that the order was void. The District Court dismissed the complaint for lack of jurisdiction. In affirming, the Court said (pp. 217-8):

> "Thus far there has been no definite legal consequence attributable to the order of July 18, 1960.

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[16] In its report in *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475 (1966), the Commission said (p. 540):

"* * * L&N is accorded the right merely to negotiate for the acquisition of C&EI's Evansville-Chicago line. The acquisition itself would require our prior approval in a separate section 5(2) proceeding, and any adverse effect thereof upon other carriers would be material to that proceeding."

> There is no fine, penalty or other sanction which flows from the Bank's refusal to abide by that order. Forfeiture of membership in the System does not ensue. * * *
>
> * * *
>
> "* * * [N]othing eventuates of a legal character upon failure to comply unless the Board proceeds under [12 U.S.C. § 327].
>
> "* * * *Action taken as a result of those proceedings no doubt would be 'final agency action' which, if adverse to the Bank, could be judicially reviewed.*"

The L&N condition herein is "preliminary, procedural, or intermediate agency action". It bears no similarity to administrative orders which were held reviewable because (a) they had "an immediate and practical effect" on complainant by determining status [17] or construing tariffs; [18] or (b) being made in the exercise of the delegated legislative function of rule making, the regulations promulgated "affect or determine rights generally, even though not directed to any particular person or corporation" [19] or (c) they were advisory orders rendered at the request of a court in regard to technical rate matters entrusted to the agency's primary jurisdiction.[20]

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[17] See, e.g., *Frozen Food Exp.* v. *United States*, 351 U.S. 40, 43-5 (1956) (*Cf. East Texas Line* v. *Frozen Food Exp.*, 351 U.S. 49 [1956]); *Rochester Tel. Corp.* v. *U. S.*, 307 U.S. 125, 143-4 (1939); *Panhandle Pipe Line Co.* v. *Comm'n*, 332 U.S. 507, 511-12 (1947).

[18] See, e.g., *Powell* v. *United States*, 300 U.S. 276, 284-5 (1937); *National Van Lines, Inc.* v. *United States*, 326 F. 2d 362, 367-73 (7 Cir. 1964).

[19] See, e.g., *Columbia System* v. *U. S.*, 316 U.S. 407, 417-25 (1942).

[20] See, e.g., *Pennsylvania R. Co.* v. *United States*, 363 U.S. 202, 205 (1960); *El Dorado Oil Works* v. *U. S.*, 328 U.S. 12, 18-19 (1946).

Conclusion

The District Court has correctly applied the principles enunciated by this Court in *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U.S. 173 (1959); *Gilbertville Trucking Co.* v. *U. S.,* 371 U.S. 115 (1962); *Alamo Express, Inc.* v. *United States,* 382 U.S. 19 (1965); *U. S.* v. *Pierce Auto Lines,* 327 U.S. 515 (1946); *I.C.C.* v. *Jersey City,* 322 U.S. 503 (1944); and *Eccles* v. *Peoples Bank,* 333 U.S. 426 (1948); and has correctly construed 5 U.S.C. § 704.

It is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. The motions to affirm should therefore be granted.

Respectfully submitted,

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November 29, 1966.

Appendix

Judicial Affirmance of Commission Orders Approving Railroad Control or Merger Application

N. Y. Central Securities Co. v. *U. S.*, 287 U.S. 12, 24-5, 28 (1932) (New York Central control of Big Four and Michigan Central);

Missouri Pac. R. Co. v. *United States*, 4 F. Supp. 449, 452 (E.D. Ky. 1933), affd. 293 U.S. 524 (1934) (Southern Pacific control of Cotton Belt);

New York, C. & St. L. R. Co. v. *United States*, 95 F. Supp. 811, 815-6 (N.D. Ohio 1951) (Pennsylvania control of Detroit, Toledo & Ironton);

Schwabacher v. *United States*, 104 F. Supp. 875, 882 (D.D.C. 1952), after remand in 334 U.S. 182 (1948), revg. 72 F. Supp. 560, 561 (E.D. Va. 1947) (Chesapeake & Ohio-Pere Marquette merger);

Benton v. *United States*, 114 F. Supp. 37, 44-5, 47 (M.D. Ga. 1953) (Central of Georgia control of Southwestern);

City of Nashville, Tennessee v. *United States*, 155 F. Supp. 98, 104 (M.D. Tenn. 1957), affd. 355 U.S. 63 (1957); *Stott* v. *United States*, 166 F. Supp. 851, 857 (S.D. N.Y. 1958) (Louisville and Nashville—Nashville, Chattanooga & St. Louis merger);

Canadian Pacific Railway Co. v. *United States*, 158 F. Supp. 248, 252 (D. Minn. 1958) (Union Pacific control of Spokane International);

Friedman v. *United States*, 168 F. Supp. 815, 818 (S.D. N.Y. 1958), affd. 359 U.S. 205 (1959) (Illinois Central merger with Alabama and Vicksburg, and Vicksburg, Shreveport and Pacific);

Fried v. *United States*, 212 F. Supp. 886, 889 (S.D. N.Y. 1963) (Erie-Lackawanna merger);

Broth. of Maintenance of Way Employees v. *United States*, 221 F. Supp. 19, 24 (E.D. Mich. 1963), affd. 375 U.S. 216 (1963) (Chesapeake & Ohio control of Baltimore & Ohio);

Florida East Coast Ry. Co. v. *United States* (not yet reported, M.D. Fla. June 8, 1966), after remand in 382 U.S. 154 (1965), revg. 242 F. Supp. 14 (M.D. Fla. 1964) (Seaboard Air Line-Atlantic Coast Line merger), now on appeal to this Court;

Erie-Lackawanna Railroad Company v. *United States* (not yet reported, S.D. N.Y. Oct. 4, 1966) (Pennsylvania-New York Central merger), now on appeal to this Court.

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No. 688

IN THE

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OCTOBER TERM, 1966

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal From the United States District Court for the Northern District of Illinois, Eastern Division.

BRIEF OF APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM

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BRIEF OF APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM

This brief is submitted on behalf of appellant St. Louis Southwestern Railway Company (Cotton Belt) in opposition to the motions to affirm.*

* Motions of the United States and Interstate Commerce Commission, Missouri Pacific Railroad Company, Louisville and Nashville Railroad Company, Chicago & Eastern Illinois Railroad Company, and Leon Leighton, *Pro Se*. References to these motions will be Government or Gov't., MoPac, L&N, C&EI, and Leighton, respectively.

Contrary to the suggestion of the MoPac that appellants are concerned with "collateral issues" (MoPac, p. 9), the series of errors committed by the Commission, if not corrected by this Court, will shape both the administration of the Interstate Commerce Act and the railroad map for years to come. Reduced to simplest terms, the Commission ratified the MoPac's illegal stock purchases that frustrated merger of the C&EI with any of the several other railroads which had displayed an active interest in the C&EI prior to the illegal purchases. That ratification followed directly from the errors of the Commission—it did not consider the circumstances, shown in the record, concerning MoPac's initial violation and thus did not fully understand what the MoPac had accomplished; did not appreciate the scope of the Commission's powers and duties under the Act; did not analyze either the practical or legal effect of the "irrevocable trust"; and believed that, because the C&EI was *in extremis* in 1961 at the close of the record, its choices were limited to approving control either by the errant MoPac or the competing Illinois Central. The end result of the Commission's action was to provide for the bifurcation of the C&EI, with the MoPac controlling the East St. Louis-Chicago line and the L&N owning or leasing the Evansville-Chicago line.*

Had the Commission reopened the record, it would have found that emergency measures were not necessary to save the C&EI from impending bankruptcy and, therefore, that the Commission's choices were not limited as it thought to

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*The interest of the Cotton Belt in this case became acute when the MoPac sought approval to buy the Alton and Southern Railway, a St. Louis terminal railroad, which, when added to its control of the C&EI's bypass route via Thebes, Illinois, would give the MoPac overwhelming power in controlling traffic moving through and around St. Louis.

the unhappy choice of either approval of the MoPac's illegal control or approval of control by the C&EI's competitor, the Illinois Central.

It also now appears that the L&N is unwilling to take the immediate steps contemplated by the Commission to operate the Evansville-Chicago line and may never operate the line.* But the success of the Commission's solution to C&EI's financial problems depends on the L&N's operation of the Evansville-Chicago line, a "dangling appendage" to the MoPac's control—to use the L&N's phrase (L&N, p. 4). It was the distressed condition of C&EI's Evansville-Chicago line, operating at a $2,700,000 loss in 1960, which was causing its problems. The East St. Louis-Chicago line, which would be controlled by the MoPac, was a profitable operation during that period, earning $2,900,000 in 1960 (J.S. 155a).

Appellees are on the horns of a dilemma. To defeat Monon's appeal, the L&N and Leighton contend that consideration of diversion of traffic away from Monon on account of L&N's operation of the Evansville-Chicago line is premature because the L&N may elect never to own or lease that line or the Commission in a subsequent §5(2) proceed-

---

* The Commission concluded that the C&EI should "permit Dixie Line [L&N] to provide service between Evansville and Chicago, including intermediate points and points on branch lines, under trackage or joint use rights temporarily, pending final determination of Dixie Line's acquisition proceeding". (J.S. 68a) After the Commission's decision was released, the L&N announced "that it has no intention to seek any temporary rights". (L&N, p. 10, Note 1) Leighton states that "There is no assurance at this time that L&N will ever make such [permanent right's] application". (p. 14) The L&N similarly casts doubt that it will ever operate the line. (L&N, p. 14)

ing may not grant L&N authority to own or lease the line. But the argument of the MoPac that overwhelming public interest considerations support the Commission's order depends on the "public interest" findings of the Commission which are based on the assumption that the L&N will in fact renovate and provide single-line service over the Evansville-Chicago line.

In order to prevent erosion of the prohibitions in the Act against unlawful control prior to Commission approval, it is essential that the Commission be advised of the extent of its powers and duties. Given a proper appreciation of its powers and duties under the Act in the light of current facts, it may be well that, on the remand, the Commission would conclude that it should restore the parties to their positions prior to the MoPac's illegal purchases to give all railroads an opportunity, within the law, to work out the ultimate destiny of the C&EI by negotiation.*

I.

ABSENCE OF FINDINGS ON CIRCUMSTANCES SURROUNDING THE INITIAL VIOLATION

The appellees do not come to grips with the issue raised by the appellants that the Commission failed to make findings as required under §8(b) of the Administrative Procedure Act which, if made, would have compelled the conclusion that the MoPac's initial illegal act in acquiring the C&EI stock was flagrant. Although suggesting that

* The President of the C&EI testified that the C&EI management feels that a "merger of the C&EI properties with a larger system or systems is desirable. Such a merger is not necessarily required with the railroad applicants in these proceedings. There are other railroads which have an interest in the C&EI, some of which are represented in these proceedings." [Statement B E, p. 2].

the Commission based its conclusion on the "nature, character and extent of and the circumstances surrounding the violation", the MoPac supports that suggestion by listing findings which deal only with its passivity *after* the illegal acquisition (MoPac, pp. 13-14). Those findings are not relevant to an evaluation of the initial violation, since the MoPac's purposes were well served by remaining passive after it had frustrated merger negotiations between C&EI and other railroads by its illegal purchases.* There are no findings in the report dealing with this critical issue.

---

* The President of the C&EI testified that the L&N shifted its interest from merger to control after the MoPac purchased the Hammack securities [Com. Tr. 2603]. He also testified that the purchase of the Hammack stock impaired his ability to negotiate merger with the L&N or any other railroad [Com. Tr. 2627].

Contrary to statements in MoPac's motion, the MoPac purchases did have a bearing on the shift in the interest of the L&N from merger to control. On cross-examination, the President of the L&N testified:

> Q (By Mr. Jessup) I will ask the question: Was it [MoPac's purchase of Hammack securities] a factor considered in influencing you to file an application for control?
>
> A Well, your question is different than Mr. McDowell's question.
>
> Q That is the reason I want to explore it with you.
>
> A Yes, I would say it was a factor. It had some bearing on it. [Com. Tr. 3010].

Furthermore, contrary to the MoPac's assertion (p. 15), the record shows that prior to its illegal control other railroads were interested in merger with the C&EI. The President of the C&EI testified as follows:

> . . . from time to time I had conversations with Mr. Heinemann of the North Western, in 1960 and again in 1961, I have had conversations with the New York Central, indicating interest in the C&EI, and I had some indications that possibly the Frisco would be interested in the C&EI.
>
> Exam. Blond: Do you mean by that "interest", a stock interest, proprietary, or securities interest.
>
> The Witness: No, discussing the merger. [Com. Tr. 4380].

The Government's motion impliedly concedes that MoPac's initial violation was "flagrant". The Government argues that "any attempt at revocation [of the trust] while the control application was pending would be a flagrant violation of Section 5(4)". (Gov't., p. 10) Revocation of the trust would place the MoPac in precisely the same position as it was in during the eight-month period prior to the trust. If revocation of the trust would be a "flagrant" violation, the initial purchase and holding of the securities for eight months in the MoPac's name are also "flagrant" violations.*

The case should be remanded to the Commission to make appropriate findings, as compelled by the evidence. Having made such findings, the Commission would then be in a position to determine whether it should summarily dismiss the application, or should weigh the public interest in respect for the law with other public interest considerations, in the light of the improved financial position of the C&EI.

II.

ERRONEOUS CONCLUSION THAT THE VOTING TRUST INSULATED THE MOPAC FROM ILLEGAL CONTROL.

This issue squarely presents to the Court, for the first time, the question of the efficacy of a voting trust to "insulate" a party from illegal control under §5(4), and thus to avoid the consequences of such illegal acts.

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* The same implied concession is found in MoPac's statement that if the trust were revoked the Commission "would undoubtedly immediately . . . order it [MoPac] to divest itself of its C&EI stock." (p. 18).

In attempting to support the District Court's conclusion that the trust was irrevocable "as a practical matter", the appellees ignore the *Chenery* issue. The Commission made no such finding, having looked only to the provisions of the trust. Consistent with *Securities and Exchange Com.* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947), the District Court's judgment must be reversed.

The trust device cannot be supported either "in practical terms" or "in legal terms". Even if one were to assume that the MoPac is unlikely to revoke, it does not follow that the trust effectively terminated control. In "practical terms" the conveyance to the trustee changed nothing. So long as the MoPac's trustee held the veto power, no railroad would even consider merger discussions with the C&EI and, in fact, no railroad conducted such discussions. In legal terms, there is no avoiding the well-established rule of law, in this instance codified by New York statute, that a settlor-sole beneficiary may revoke a trust at will.*

Heretofore the Commission has disapproved the trust device in some cases (*McLean Trucking Co.—Investigation of Control*, 70 M.C.C. 601, 607 (Com. 1957)), but more

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* The only argument in support of the majority's conclusion that the trust may be irrevocable which was not dealt with in the Jurisdictional Statements is an argument advanced by the MoPac for the first time that under New York law the trust could not be revoked without approval of the trustee (MoPac, p. 17, Note). The cases cited by the MoPac do not so hold, and *Stover* v. *Garber*, 266 N.Y.S. 2nd 623, 25 App. Div. 2nd 488 (1966) holds directly to the contrary.

recently has been inclined to approve the trust device, as suggested by the Government (Gov't., p. 10). This issue is too important to remain in its present posture of approval by the Commission with the blessing of a divided three-judge Court. Indeed, affirmance by this Court will be taken as a green light to the railroad industry to use the trust device for avoiding the consequences of illegal acts under §5(4).

III.

POWER OF THE COMMISSION SUMMARILY TO DENY A CONTROL APPLICATION UPON FINDING OF VIOLATION OF THE ACT.

The Government argues that the Commission has the power to balance the severity of a violation against other public interest considerations (Gov't., pp. 8-9). That is not the issue before this Court. The error of the Commission was its conclusion of law that it did not have the power "to summarily deny Missouri Pacific's application" upon a finding that the MoPac had violated §5(4) of the Interstate Commerce Act, no matter how serious the violation might be.

The MoPac and Leighton argue that the Commission may not summarily deny an application for control upon finding a §5(4) violation, relying on *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115 and on a subsequent lower court decision affirmed by this court, *Alamo Express, Inc.* v. *United States,* 239 F. Supp. 694 (W.D. Tex. 1965) aff'd 382 U.S. 19. (MoPac, pp. 11-12; Leighton, pp. 6-7).*

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* Leighton also attempts to rewrite the Commission's report by suggesting that the Commission did not mean what is said. (pp. 6-7).

That is not the holding of *Gilbertville,* the Court having expressly stated that "an automatic rule is not necessarily arbitrary". (p. 128) If *Alamo Express* is taken to mean that an automatic rule is necessarily arbitrary, then it is indeed important that the scope of the Commission's power be clarified.

Given a proper appreciation of its powers and appropriate findings on the circumstances surrounding the initial violation, the Commission, on remand, may conclude to invoke an automatic rule. But it first must be told by this Court that it has such power under the statute.

IV.

FAILURE TO REOPEN TO RECEIVE FACTS CONCERNING MOPAC'S PURCHASES OF ADDITIONAL RIGHTS IN THE C&EI.

The appellees attempt to support the Commission's refusal to reopen the record to consider the legality of MoPac's purchases of additional stock rights on the ground that the rights were held in the trust, ignoring the conclusion of the District Court that the rights were held outside the trust. A majority of the Court excused these additional violations of the law on the ground that the Commission considered the facts surrounding the additional purchases and that there "is warrant in the law and facts for the result reached". (J.S. 21a) The Court erred, however, in so holding because the Commission re-

fused to reopen the record to consider such facts.* This was a substantial error on the part of the District Court and the case must be remanded to the Commission for its consideration.

V.

FAILURE TO REOPEN TO RECEIVE FACTS UNDERMINING PREDICATE OF COMMISSION'S DECISION.

The L&N concedes that the railroad economic outlook is sharply different today from the situation in 1961 when the record was closed. In attempting to answer appellant Monon's charge that the Commission ignored the Monon's estimates of traffic diversion, the L&N says:

> With respect to the Monon's estimate, it does not take into account such factor as that the study period was 1961, when the railroads' share of intercity traffic and the level of economic activity were lower than in recent years. [L&N, p. 7]

If the change in the railroad economic picture is so different as to substantially affect the diversion estimates of the Monon, it must be sufficiently different to cause the Commission to reconsider whether the C&EI is still *in extremis*. We need not engage in speculation, because the facts tendered in the petitions to reopen show that the C&EI has

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*All the facts surrounding the additional purchases were not in the record, as stated by the MoPac in its motion (p. 19). The General Counsel of the Commission candidly so conceded in his argument before the Court:

> Judge Decker: Do we have all of the details as to that acquisition in this record?
>
> Mr. Ginnane: All of the details, no, sir.
>
> [Court Tr. p. 85]

steadily improved over the five-year period since the close of the record.*

Only the Government attempts to distinguish the facts in the instant case from the facts in *Atchison, T. & S.F.R. Co.* v. *United States,* 284 U.S. 248 (1932), asserting that "such a recent change in the company's financial condition is hardly the overwhelming change in circumstances which required rehearing in *Atchison*" (pp. 15-16). The changes considered by this Court in *Atchison* were from the close of the record in September, 1928 to 1931. Here the changes in the condition of the C&EI have been building steadily from 1961 to date, or almost five years. The changes in the economic indicators detailed by this Court

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* Leighton presents financial data said to be from the C&EI's Annual Report to the Commission (Leighton, p. 11). The data actually reported by the C&EI to the Commission are not as stated by Leighton. The 1965 Balance Sheet reported to the Commission shows current assets of $11,735,791 and current liabilities of $9,104,852, for a comfortable working capital of $2,630,939. Debt due within one year is reported as $2,475,447.

Leighton's concern about the amount of debt due in one year is unwarranted. For the first three quarters of 1966, the C&EI reported net income after fixed charges of $2,747,793 and depreciation of $1,974,776, giving more than ample coverage to retire debt payable in 1966. In contrast, the 1961 data relied upon by the Commission showed a *negative* working capital of $2,047,000 and debt due within one year of $2,884,000 (J.S. 106a-108a).

in *Atchison* are less dramatic than here.* If the Commission acted within its discretion in denying the petitions here, then it is impossible to escape the conclusion that *Atchison* is no longer the law. We submit that the Court should give plenary consideration to this question before it decides whether to overrule *Atchison*, giving administrative agencies *carte blanche* authority to decline to reopen records when there have been overwhelming changes in circumstances which are critical to resolution of the issues of a case.**

On a reopened record, the Commission may conclude that the C&EI is strong enough to remain independent, at least until its destiny can be determined by orderly, legal procedures. In *Western Pacific Control—Southern Pacific*, Finance Docket No. 21314, *et al.* (January, 1965), rendered

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* For example, in *Atchison* revenues were down 14.92 percent and here C&EI revenues are up 24 percent; in *Atchison* carloadings were down 14.06 percent from 1930 and 20.98 percent from 1929 and here C&EI revenue car-miles are up 19 percent; in *Atchison* the market price of common and preferred stock had so declined as to make it impossible to secure additional capital through sale of stock and here the price of C&EI stocks has risen to the point that the C&EI could make the first issue of equity stock of any railroad since the Great Depression. (Factors given in 284 U.S. at 256-7 and Cotton Belt's Petition for Reconsideration, pp. 6-8).

**Appellees contend that the Commission's refusal to reopen is within the standards defined by *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503 (1944) and *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515 (1946) (Gov't., p. 16; Leighton, pp. 12-13). In those two cases there was no showing that the new facts would have led to a different result than that already reached by the Commission. Here the public interest conclusions depend on the Commission's finding that immediate action was necessary to prevent impending C&EI bankruptcy (J.S. 91a).

only a month before the decision here, the Commission disapproved control by either Southern Pacific or the Atchison, Topeka and Santa Fe Railway of the Western Pacific Railroad, which is a short-haul bridge carrier like the C&EI. The only significant difference in the two railroads was that the Western Pacific was in fairly sound financial shape, whereas the C&EI appeared to be in serious financial difficulty, based on the stale financial data upon which the Commission relied.

CONCLUSION.

The questions presented by this appeal are important and substantial and the judgment of the lower court is erroneous. This Court should note probable jurisdiction.

Respectfully submitted,

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December, 1966

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No. 687

Supreme Court of the United States

OCTOBER TERM, 1966

ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*,

v.

UNITED STATES OF AMERICA ET AL., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF OF APPELLANT ILLINOIS CENTRAL RAILROAD COMPANY IN OPPOSITION TO MOTIONS TO AFFIRM

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF OF APPELLANT ILLINOIS CENTRAL RAILROAD COMPANY IN OPPOSITION TO MOTIONS TO AFFIRM

The position of the appellees who address themselves to the questions raised by this appeal comes to this: The Interstate Commerce Commission found that control of the C. & E.I. by the Missouri Pacific would

strengthen the financial position of the C. & E.I. and thereby improve transportation services and facilities and for that reason was "consistent with the public interest" (App. 2, p. 49a); that finding is within the Commission's competence, and nothing else in the case matters. That view ignores the fundamental issue that underlies the important questions presented on this appeal.

The Commission here concluded that the Missouri Pacific should be permitted to retain and to exercise control admittedly acquired in deliberate violation of an explicit statutory prohibition. The fundamental issue is whether in reaching this conclusion the Commission acted on a correct understanding of its own legal authority and whether it supported its decision with adequate findings that have a rational basis in the record.

Since Congress has seen fit to provide that it shall be unlawful for one rail carrier to acquire control of another without prior Commission approval, this issue cannot be dismissed as "collateral" merely because the Commission has made certain findings concerning improvements in transportation services and facilities. (MoPac Motion p. 9; cf. Gov't Motion pp. 7-8). The public interest standard of Section 5(2) comprehends law observance and enforcement as well as transportation benefits. Nor will it do to urge that the Commission has unfettered discretion to decline to consider intervening events that cast the gravest doubt on the validity of its conclusion that the critical financial situation of the C. & E.I. required the Commission to bless the Missouri Pacific's unlawful acquisition of control. (Gov't Motion pp. 15-16; MoPac Motion pp. 20-22).

I. The Commission Erred in Disclaiming the Power to Deny a Section 5(2) Application Because of a Section 5(4) Violation.

The Commission found that the Missouri Pacific had violated Section 5(4) of the Interstate Commerce Act by acquiring the power to control the C. & E.I. without the prior approval of the Commission. It said that despite the finding of a statutory violation "we are not free to summarily deny Missouri Pacific's application" for approval of its acquisition of control of the C. & E.I. (App. 2, p. 89a).

This was a holding that the Commission was not free to deny approval to an unlawful acquisition of control but was required as a matter of law to consider whether the illegal act would improve transportation services and facilities. The holding necessarily implies that the legal standard of Section 5(2) incorporates the public interest in law observance and enforcement only in a subordinate and limited degree and that the paramount question in any case of an unlawful acquisition of control is whether the illegal act will tend to improve transportation services and facilities. In thus holding that it must entertain and consider an application of a violator of Section 5(4), filed and prosecuted during the period of violation, for authority to retain the benefits of the violation, the Commission denied itself legal authority to adopt a simple and effective means of vindicating the public interest that lies in compliance with the statutory requirement of prior approval of carriers' acquisitions of control of other carriers, *i.e.*, the denial at the threshold of an application for approval submitted after an illegal acquisition. The question presented is whether the Commission has the authority to regard a grave and deliberate violation of the law as in itself decisive.

We submit that the Commission's resolution of this question against its own authority finds no support in the words or policy of the statute and is inconsistent with the pronouncement of this Court in *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115, 128.

The court below did not even advert to the question. Nor does the Government in its motion to affirm here. The Government instead erroneously imputes to appellants the argument that the Commission legally was bound to deny the Missouri Pacific's application because of its antecedent violation. (Gov't Motion pp. 8-10). Since appellants do not make this argument the Government's suggestion that it is answered by the opinion of this Court in *Gilbertville Trucking Co.* v. *United States, supra,* is irrelevant. Our argument is that the Commission erred when it held itself powerless under its statute even to consider whether it should deny the Missouri Pacific's application without more. Nothing in the *Gilbertville* case is inconsistent with that argument. Quite to the contrary, the Court said in *Gilbertville* that "an automatic rule [of disqualification of violators of Section 5(4)] is not necessarily arbitrary." 371 U.S. at 128.

The Missouri Pacific recognizes that the Commission held what appellees say it held and attempts to justify the holding. (MoPac Motion pp. 11-12). The appellee Leighton also tries to justify the holding but implies, alternatively, that the Commission did not mean what it said and asserts that "the Commission does not need a judicial pronouncement on the subject of its power." (Leighton Motion pp. 6-7). It is to be noted that Mr. Leighton points to no findings or language in the Commission's report that provide support for his attempt to rewrite the Commission's report. Mr. Leighton's attempt to support his revision by reference

to a passage in the Commission's report in *Central of Georgia Ry. Control,* 307 I.C.C. 39, 42 (1963), is not apt. In that passage the Commission did not hold that it lacked authority to deny the application of one who had acquired control unlawfully but on the contrary observed that an illegal acquisition of control did not "necessarily" bar approval of an application—a statement with which appellant does not disagree.

In support of the Missouri Pacific's sole argument on this score and Mr. Leighton's principal argument—that the Commission was correct in ruling that in a proceeding under Section 5 of the Act it must consider the transportation service aspects of an application for approval of control regardless of a prior violation of the statute—the appellees rely on two points.

The first is that the Commission is bound to consider what will best serve the public interest. This is nothing more than a question-begging restatement of the basic issue since that issue is whether the Commission has statutory authority to regard the public interest in law enforcement and observance as decisive. With respect to this point the appellees purport to find support in *Gilbertville Trucking Co.* v. *United States, supra,* but the Court in *Gilbertville,* as we have said, indicated very plainly that a rule disqualifying Section 5 violators from approval of the transaction to which their violations were related is consistent with the statute. The other assertion relied upon by these appellees is that the question of the Commission's power posed here was decided by this Court in *Alamo Express, Inc.* v. *United States,* 382 U.S. 19, *affirming* 239 F. Supp. 694 (W.D. Tex. 1965). But the argument made in the district court and on the appeal to this Court in that case was not that the Commission

erroneously disclaimed power to deny a Section 5 violator's application without more but that in the circumstances of that case the Commission erred in granting a control application despite a violation.

The Missouri Pacific ignores the ruling of the Civil Aeronautics Board that the procedure contemplated by its "Sherman doctrine" is "an appropriate one" under Section 408 of the Federal Aviation Act, whose terms are drawn very largely from Section 5 and which is the same in its purpose. *Sherman, Control and Interlocking Relationships,* 15 C.A.B. 876, 881 (1952).

Mr. Leighton describes the CAB rule as a "Draconian automatic rule," thus recognizing that the nature of that rule is correctly described in our jurisdictional statement.[1] Mr. Leighton attempts, how-

[1] The Government, on the other hand, asserts that "no regulatory agency in fact follows a rule of absolute disqualification" and attempts in a footnote to make it appear that in its statement and application the Sherman rule of the CAB is consistent with the holding of the Commission here that it has no authority to deny an application simply on the ground that control was acquired in violation of the statute. (Gov't Motion p. 9 & n.10). In this respect Mr. Leighton is correct, and the Government is wrong. It is one thing to say, as the CAB has, that an application for approval will not be considered so long as an illegal relationship continues save in exceptional circumstances, that the agency will not consider circumstances in mitigation of violations, and that the creation of a voting trust will not be regarded as eliminating or mitigating an illegal control relationship. It is quite a different thing to say, as the ICC said here, that it has no statutory authority to deny an application on the ground that control was acquired in violation of the statute but must in every case consider whether the illegal act will result in transportation benefits. The fact that the CAB leaves room for waiving its rule in "exceptional circumstances" by no means assimilates its rule to the holding of the ICC here.

ever, to dismiss the relevance of the CAB rule on the ground that rail and motor transportation differs from air transportation. (Leighton Motion p. 8, n. 9). Mr. Leighton does not explain why the public interest in law observance and enforcement is any less in the case of rail and motor transportation than it is in the case of air transportation. In any event his argument misconceives the nature of the question posed. That question, it bears reiteration, is not whether the Interstate Commerce Commission must adopt the CAB rule but whether it has legal authority to do so. The Commission has decided this case on the assumption that it lacks that authority. We submit that in disclaiming the authority the Commission erred, and this Court said as much in *Gilbertville*. The question should be resolved.

II. The Missouri Pacific's Violation Was Deliberate, Flagrant and Continuing.

Certainly if the Commission had considered itself free in any circumstances to debar a Section 5(4) violator it might appropriately have applied that sanction against the Missouri Pacific in this case. The Missouri Pacific's violation was deliberate, and none of the factors relied upon variously by the Commission, the court below and now the parties to the appeal in this Court as having mitigated the violation in fact were mitigating factors at all.

It is not at all clear indeed just why the parties regard the violation of Section 5(4) by the Missouri Pacific as anything less than deliberate and flagrant—or even that they do so regard it.

The Missouri Pacific states that its violation of Section 5(4) was "inadvertent," but on the same page

of its motion it states that the purchase of securities by which control was illegally acquired was undertaken "as a prelude to its application for control of C&EI"—which makes clear that the only possible inadvertency lay in the Missouri Pacific's buying more securities, at a premium, than it really wanted to buy. (MoPac Motion p. 15). The Government characterizes the Missouri Pacific's violation of Section 5(4) as "relatively minor" without attempting to give any specific content to either the adverb or the adjective. (Gov't Motion p. 9). Elsewhere the Government apparently recognizes that this palliative characterization could not apply to the unlawful actions of the Missouri Pacific in the eight-month period that preceded the creation of the voting trust. It concedes that had the Missouri Pacific revoked the voting trust of the securities whose ownership gave rise to the "relatively minor" violation it would have been "a flagrant violation of Section 5(4)." (Gov't Motion p. 10).

The Government's argument that the violation of the law was "relatively minor" completely ignores the preclusive effect of the initial illegal acquisition of the securities—an effect that was not in any practical sense dissipated by the subsequent creation of the voting trust. There was testimony before the Commission that the Missouri Pacific acquired the stock unlawfully for the specific purpose of keeping it out of the hands of others. (Tr. 2285). The record demonstrates that the illegal acquisition achieved that purpose because it gave the Missouri Pacific a preferred position in its efforts to attain control of the C. & E.I. It is no answer to say, as the Missouri Pacific does, that the illegal acquisition did not discourage the

Illinois Central. (MoPac Motion p. 15). The situation cannot be viewed as involving merely a contest between the Missouri Pacific and the Illinois Central. There was evidence, including testimony of the president of the C. & E.I., that other carriers were interested in control of or merger with the C. & E.I. but that they terminated their conversations with that carrier after the Missouri Pacific made its original acquisition of securities. (Tr. 2627, 4830). As a practical matter the acquisition gave the Missouri Pacific effective power to veto any arrangement that the C. & E.I. might have reached with these other interests. In its findings the Commission did not even consider this aspect of the conduct of the Missouri Pacific but appears simply to have assumed that the initial acquisition of the securities was devoid of any practical consequences.

With respect to the situation that existed after the creation by the Missouri Pacific of a voting trust, which was the principal factor in mitigation relied upon by the two tribunals below, the parties manifest the same kind of confusion.

The voting trust was found by the Commission to be irrevocable as a matter of law, and, as we have pointed out in the jurisdictional statement, for this reason among others the Commission concluded that the trust effectively insulated the Missouri Pacific from control of the C. & E.I. The District Court did not decide whether the Commission was correct in its legal conclusion. The Missouri Pacific urges that this Court now decide this question of law—a question which we submit the dissenting judge below correctly regarded as critical to the Commission's decision—and decide it favorably to the Commission on the basis of the motion

papers, on the basis indeed of a single footnote in the Missouri Pacific's motion. (MoPac Motion p. 17 n.*).[2] The Government, on the other hand, says that the legal question is of no moment because the contingency of revocation is a "remote one." (Gov't Motion p. 10). The Missouri Pacific also urges this ground alternatively. It is enough to say that the Commission could have decided the matter on that ground, but it very plainly did not do so. Its decision cannot therefore be sustained on that ground. *SEC* v. *Chenery Corp.*, 318 U.S. 80.

All of the appellees gloss over or ignore the fact, which was also ignored by the Commission, that regardless of the revocability of the voting trust even after its creation the situation that caused the Commission to find a violation of Section 5(4) persisted. That situation was the holding by the Missouri Pacific of

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[2] The Missouri Pacific refers to (1) a New York voting trust statute, N.Y. Stock Corp. Law § 50, that deals only with New York corporations, of which the C. & E.I. is not one, and that was not in any event complied with (*e.g.*, in its provision that trusteed stock is to be surrendered and new certificates issued to the trustee); (2) Hearst v. American Newspapers, Inc., 51 F. Supp. 171 (D. Del. 1943), distinguished in our statement (p. 27 n.11); (3) decisions of this Court standing for the general proposition that in some circumstances a person may be estopped to act inconsistently with a representation he has made, a proposition not usually applied to representations as to legal conclusions such as irrevocability of a trust; and (4) *In re* Mordecai's Trust, 24 Misc. 2d 668, 201 N.Y.S.2d 899, *aff'd*, 12 App. Div. 2d 449, 210 N.Y.S.2d 478 (1960), holding that when a trust is stated to be irrevocable without the consent of the trustee, as is not true here, such consent must be had even though the settlor is the sole beneficiary. Compare Stover v. Garber, 25 App. Div. 2d 488, 266 N.Y.S.2d 623 (1966). At the very least it is plain that the question of the revocability of the Missouri Pacific's voting trust cannot be summarily answered on the basis of the authorities it cites.

enough of the C. & E.I.'s securities to permit it to veto a merger or lease or sale of the carrier's assets.

This condition persisted after creation of the voting trust because, contrary to the Government's assertion that "no limitations or restrictions were imposed on the trustees' authority to vote the securities independent of the settlors" (Gov't Motion p. 4), the Missouri Pacific's voting trust instrument provided that the trustee should not vote at all for the acquisition of control of the C. & E.I. by the Missouri Pacific "or by any other company except as may be permitted or authorized by the Interstate Commerce Commission or required by a court of competent jurisdiction." (MoPac Motion App. 8). Without the affirmative vote of the Missouri Pacific's securities, transactions amounting to acquisition of control of the C. & E.I. could not be approved or consummated. The quoted instructions to the trustee in the trust instrument effectively vetoed all such transactions except in the limited circumstances described in the instrument.[3]

Finally, with respect to the nature of the Missouri Pacific's violation of Section 5(4), the appellees do not face up to the District Court's analysis of the acquisition by and on behalf of the Missouri Pacific, after the voting trust was created, of additional securities, increasing its control over the C. & E.I. The District Court concluded that for a period prior to their outright purchase by the Missouri Pacific and their placement in the voting trust certain of such securities, representing 32 per cent of the stock interest of the

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[3] The Interstate Commerce Commission has no statutory power to pass upon a non-carrier's merger with or acquisition of control of the C. & E.I., and thus it could not permit or authorize it.

C. & E.I., must be ascribed to it directly because of options it had to buy them from investment banker associates. (App. 1, pp. 20a-21a).

The Appellees scarcely advert to the District Court's analysis. Rather, they rely upon and attempt to embellish the Commission's bare assertion, in denying petitions to reopen the record to receive evidence concerning the additional acquisitions, that the matter was rendered moot by the fact that upon their outright purchase the securities did go into the voting trust.

One embellishment is the Missouri Pacific's assertion that the evidence that was the subject of the petitions to reopen was already in the record before the Commission merely because the Missouri Pacific had reported, to the Commission and the parties to its proceeding, the outright purchases of securities when they were made. (MoPac Motion p. 19). This is an odd view of what is included in an evidentiary record, and it is a view that the Commission did not take.

The Commission simply denied the petitions to reopen as moot. The District Court embroidered upon this spare denial by saying that the Commission "was entitled to consider" the power inherent in the optioned securities and the conditions under which the Missouri Pacific had access to them. (App. 1, p. 21a). The Missouri Pacific goes one unjustifiable step farther and asserts that "[t]he District Court and the Commission recognized" that there were conditions upon the access of the Missouri Pacific to the power represented by the securities. (MoPac Motion p. 20). The Commission recognized no such thing. It denied the petitions to reopen to receive evidence concerning the Missouri Pacific's subsequent securities acquisitions

on the sole ground that the matter was moot because upon their purchase the securities were placed in the voting trust. There is no indication in the Commission's report that it considered at all whether prior to its purchase of the securities the Missouri Pacific's holding of the options constituted a Section 5(4) violation, much less that it decided that there was no violation because it "recognized" that there were limitations upon the railroad's access to the optioned securities.

Once the District Court discerned, as the Commission had not, that there was a basis for finding a violation of Section 5(4) by reason of the Missouri Pacific's holding of the options, it was not entitled to determine *de novo* whether there had been such a violation on the basis of matters that the Commission "was entitled to consider" but that in fact it did not consider. It is an elementary principle of judicial review that an agency order must stand or fall on the grounds given by the agency and that it cannot be sustained on grounds subsequently invented by counsel or a reviewing court. In the circumstances, the District Court should have returned the case to the Commission so that the matter of the options could be considered by it.

III. The Commission Erred in Blinding Itself to the Recovery of the C. & E.I.

The basis for the Commission's judgment that the public interest required another carrier to have control of the C. & E.I. was in findings concerning the C. & E.I.'s unfortunate financial results in 1959, 1960 and 1961. At most the Commission saw a trend that culminated in those years. We submit that this is apparent from a fair reading of the Commission's report.

(See App. 2, pp. 104a-09a, 118a-19a, 180a-88a, cited in MoPac Motion p. 21). In an order entered long after it issued its report the Commission said that its judgment was based on the C. & E.I.'s long-term history. (MoPac Motion App. p. 17). However often the appellees repeat that statement, it does not jibe with what the Commission emphasized in its report as the determinative findings. These were that the C. & E.I.'s situation had progressively worsened until it had become critical in the latest years reflected in the record. In subsequent years, as parties offered to prove on their petitions for rehearing, the C. & E.I.'s situation had changed markedly. Another and quite opposite trend had begun. In these circumstances the Commission was bound to reopen the record to enable itself to determine in light of current facts where the public interest lay.

In saying this, we recognize that agencies must have a large measure of discretion in passing upon petitions to reopen the records of proceedings before them. *ICC* v. *Jersey City,* 322 U.S. 503, 514-16. But there are situations in which circumstances have so changed that it is an abuse of an agency's discretion to decline to reopen to consider the changed circumstances. *Atchison, T. & S.F. Ry.* v. *United States,* 284 U.S. 248. We submit that this case presents one of those situations.

First, there is no doubt of the significance that the Commission attached to the condition of the C. & E.I.; if that condition is not as the Commission saw it, its decision rests on a false premise. Secondly, action authorized by the Commission in this case is final. It is unlike a case involving rates, for example, over which the agency may maintain a continuing surveillance, making the necessity less that it reopen any particular

rate proceeding to bring itself current. And finally, there is the fact that in this case the supposed emergency of the C. & E.I. was treated by the Commission as a compelling reason for delivering the carrier to the Missouri Pacific despite the latter's violation of the law; the violation was forgiven in large part because the Commission thought that the C. & E.I. was in irremediable crisis. (App. 2, pp. 89a-91a).

In fact there was no urgent crisis at the time the Commission spoke; there is none now. The C. & E.I. did not regard itself as an emergency case at the time of the Commission's decision. It was aptly described by a dissenting member of the Commission as "an exceedingly reluctant bride . . . [which] contends that the circumstances of 1960, upon which the majority bases its decision, have changed so radically as to make our record in these cases obsolete." (App. 2, p. 95a). Nearly two years later, in this Court, the C. & E.I. in its short motion to affirm does not urge that any dire consequences will result if control does not speedily pass to the Missouri Pacific.

Moreover, in contending that the questions raised by the appellant Monon in No. 689 are raised prematurely, the appellees emphasize that conditions in railroading change. The appellee Louisville & Nashville even criticizes the Monon's diversion estimate on the ground that the base period for it was 1961, "when the railroads' share of intercity traffic and the level of economic activity were lower than in recent years." (L&N Motion p. 7). The C. & E.I. has shared in the recovery of the railroads in the years since 1961, which was also the last year of its operation that was reflected in the record before the Commission. There is no longer any emergency.

CONCLUSION

The ultimate question placed before this Court by the Illinois Central is not whether it or the Missouri Pacific should be allowed to acquire control of the C. & E.I. There are other possibilities of consolidation as well as the possibility of maintaining the C. & E.I. as an independent bridge carrier. A reversal of the judgment below on the grounds urged here would result simply in the case being returned to the Commission for a fresh consideration of problems of the C. & E.I. free from the effects of the Missouri Pacific's illegal acquisition. The questions to be answered in determining whether such fuller consideration should be had are substantial. Probable jurisdiction should be noted.

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IN THE

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OCTOBER TERM, 1966.

No. 689

MONON RAILROAD,

Appellant,

vs.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION.

BRIEF OF MONON RAILROAD IN OPPOSITION TO MOTION TO AFFIRM.

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MONON'S CONTENTIONS.

Monon's Jurisdictional Statement contended:

1. That the District Court erred in holding that Monon was not entitled to judicial review because there will be a later 5(2) (49 U. S. C. 5(2)) proceeding for the purpose of approving the completion of the acquisition authorized herein, at which time Monon can raise its present objections (App. 26a, 27a); and

2. That the Commission, in authorizing L&N to acquire the Evansville Line of the C&EI, failed to make the required basic findings as to Monon's evidence of competitive damage to it, which damage, if permitted, would violate the public interest requirement of 5(2).

APPELLEES' CONTENTIONS.

Appellees[1] contend that the Commission's determination is not reviewable because the final acquisition of the Evansville Line for numerous hypothetical reasons might not be consummated. They also contend that Monon, although denied any consideration of its evidence herein, will be adequately and fully protected in a later hearing. It is argued that if the Commission does not afford Monon a hearing in the later 5(2) proceeding (L&N, p. 14) or if Monon "feels aggrieved", Monon can then ask for judicial review. It is claimed that the doctrine of *res judicata* does not apply. These contentions ignore the fact that the Commission determined that public interest required the acquisition of the Evansville Line by L&N and that this final determination of the basic issue here involved cannot be again reviewed save in this court. L&N contends (p. 5) that adequate findings were made as to Monon's evidence.

Significantly, not one appellee attempts to deny the gravity of the damage to Monon resulting from such acquisition.

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1. The Motions to Affirm of Louisville and Nashville Railroad, the Interstate Commerce Commission and Leon Leighton are referred to herein as "L&N", "Com." and "Leighton", respectively.

I.

MONON IS ENTITLED TO JUDICIAL REVIEW HEREIN.

A.

The Public Interest Issue Had to Be and Was Decided.

Appellees do not dispute and in fact stress that public interest requires that the Commission authorize acquisition of the Evansville Line by L&N and that such determination is final (Com., p. 14; Leighton, p. 14, Footnote 12). To do otherwise would jeopardize the very authority eagerly sought by L&N and also by MoPac since a careful reading of the order shows that MoPac's rights are conditioned on the L&N acquisition.[2]

The Commission could not authorize said acquisition until and unless it found the acquisition was in the public interest as required by 5(2) (b).[3] The Commission emphatically found that the L&N acquisition was in the public interest (App. 57a). The District Court recognized that the

2. The contrary contentions (L&N p. 13; Com., p. 11; Leighton p. 14) cannot be sustained. The authority granted MoPac was expressly conditioned on acquisition of the Evansville Line by L&N (App. 67a) through compulsory negotiations (App. 57a). To assure such final acquisition, numerous requirements were imposed (App. 67a, 68a, 92a). If the public interest issue is open as to one adversary, Monon, in the later 5(2) proceeding, of necessity it must be also open as to the other adversary, L&N. If it is open as to L&N, it must remain open as to MoPac because without the L&N (Dixie) conditions, the Commission apparently would not have found control of the C&EI (Eastern) by MoPac to be in the public interest (App. 49a, ¶2).

3. 5(2) (b) provides:

"• • • If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction • • • will be consistent with the public interest, it shall enter an order approving and authorizing such transaction upon the terms and conditions and with the modifications so found to be just and reasonable: • • •."

Commission was required to and did make such a finding (App. 26a). This determination, which was required under 5(2), of necessity rejected Monon's contention that such determination was against public interest because of the resultant damage to Monon.

B.

Under Appellees' Theory, No 5(2) (b) Order Could Be Reviewed.

Appellees would deny judicial review to Monon because the order is "iffy" (Leighton, p. 15). This contention ignores the fact that all orders under 5(2) (b) are only permissive in granting approval and cannot be mandatory. *St. Joe Paper Company* v. *Atlantic Coast Line R. Co.*, 347 U. S. 298, 305, 306, 309, 310. The Court is well aware that many Commission orders are permissive only; yet in all such cases, even though the results envisioned by those orders may never come to pass, such orders are nevertheless fully reviewable when issued. Under appellees' argument, a court could not review 5(2) (b) orders until performance had been completed, which, of course, in the present case would make the review not a review of the order, but rather would impose on the reviewing court the impossible task of seeking to unravel an accomplished fact.

C.

Appellees' Authorities.

Significantly, the Commission's brief cites no authorities to sustain its contentions except the lower court opinion herein and an excerpt from the Commission Report in the Penn Central Merger proceeding (Com., p. 14). The L&N's

only argument (L&N, p. 13) is that Monon is asking this court to prejudge the later 5(2) proceeding.[4]

The authorities cited by Mr. Leighton involve situations where the agency process had not been completed. In *Eccles* v. *Peoples Bank* (1948), 333 U. S. 426 (Leighton, p. 15), the Federal Reserve Board unanimously voted that "public interest" called for no action (431) concerning a purchase of stock which could have been in violation of an express condition imposed upon Peoples Bank as part of its admission to the system. Despite such disavowal, a declaratory judgment was sought and denied. Also, enforcement of the board order would require a further hearing (429).

Likewise, *American Air Lines* v. *Civil Aeronautics Board*, 178 Fed. 2d 903 (1949) (C. A. 7) (Leighton, p. 15) is not in point. There, as part of other legal issues not pertinent here, the Civil Aeronautics Board (CAB) directed Railway Express Agency (Railway) to negotiate the revision of certain agreements existing between Railway and certain air carriers in the manner specified by CAB and to submit any revised agreements to CAB for approval within six months. Railway did not join in the appeal of the carriers who attacked this CAB directive on numerous grounds.

The controlling distinction between American Airlines and the case at bar is that only future negotiations were there involved which, when completed, would require subsequent review by CAB; while here, the ultimate question of the acquisition of the Evansville Line by the L&N has been approved by the Commission as in the public interest. Here, the Commission acknowledged (App. 57a) that mere negotiations could be carried on by the railroads without Commission approval. By contrast, the acquisition of the

4. In the lower court, L&N joined Monon in contending that this matter was final and ripe for review, and further contended that MoPac was seeking a trial *de novo* as to the L&N conditions.

Evansville Line by the L&N, an acquisition which would be otherwise illegal under 5(4),[5] has been approved and as a necessary prerequisite thereto the Commission has made a final determination that the acquisition is in the public interest. In *American Airlines*, until the negotiations were completed and were reviewed by CAB, the controversy, if any, that might later develop could not even be defined. This is sustained by the court's quotation from another case on page 910, where it is stated:

> "* * * It may be a step, which if erroneous will mature into a prejudicial result, as an order fixing valuations in a rate proceeding may foreshow and compel a prejudicial rate order. But administrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as the consummation of the administrative process. (Citations) * * *"

The court there recognized that where some legal relationship has been fixed, such as here, where the controlling determination has been made, viz., that the acquisition is in the public interest despite a threatened loss of $1,800,000 per year to Monon, such a determination is reviewable. It cannot be stated here, as it was there, that the Monon has lost nothing by this determination (pp. 910-911).

Sunray Mid-Continent Oil v. *Federal Power Commission*, 270 Fed. 2d 404, involved a hypothetical question as to Sunray's rights if it should discontinue its service, which it had no intention of doing. In *Continental Bank and*

5. 5(4) (49 U. S. C.) provides:
"It shall be unlawful for any person, except as provided in paragraph (2) of this section, to enter into any transaction within the scope of subdivision (a) of paragraph (2) of this section, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, * * *."

Trust Company v. *Martin,* 303 Fed. 2d 214 (Leighton, p. 16), the Federal Reserve Board issued an order directing the plaintiff therein to increase its capital and surplus by $1,500,000; however, to enforce this order, it was first necessary to bring an action under Section 9 (12 U. S. C. 327), which expressly provides for a hearing. The court held until such hearing the Board had no power to take action and "no definitive legal consequences" arose. Here, the order being permissive is self executing when entered. In *Continental,* the order had to be mandatory in nature requiring enforcement provisions to make it effective. Without a further hearing, there was no enforcible order.

If the public interest issue is open to Monon in the later proceeding, then the order is not final as to anyone (ante, footnote 2, p. .....), and in accordance with Mr. Leighton's authorities, the whole proceedings, including the later 5(2) proceedings, should be determined before any judicial review can be sought.[6] However, the Commission has not indicated that Monon can retry the public interest issue. In fact, its order demonstrates that the public interest issue has been determined when it held (App. 92a) "Exceptions and arguments not specifically discussed herein have been considered and found to be without merit."[7]

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6. The Examiner so indicated in stating (Examiner's Report, p. 123):

> "• • • the proposals of Dixie Line (L&N) would prevent the authorization herein *from taking effect* unless and until the demands of Dixie Line are satisfied." (Italics ours.)

7. An attempt is made to assure Monon that it can again retry the public interest issue by referring to a gratuitous statement in *Pennsylvania Railroad Company—Merger—New York Central Railroad Company,* 327 I. C. C. 475, 540 (Com., p. 14; Leighton, p. 16, footnote 16) to the effect that Monon should address its complaint herein to the later 5(2) proceeding rather than in that merger proceeding. Monon is unable to determine whether this statement is an effort to bolster the omissions here or whether it was a means of eliminating Monon from that merger case. Obviously, the Commission could not retain jurisdiction on the public interest issue herein by so stating in a collateral proceedings.

D.

Monon's Counter Authorities.

Unlike courts which normally dispose of one controversy, administrative agencies have continuing supervision over regulated industries involving recurring and often interrelated orders. Practicality and justice necessitate that an agency order from which legal consequences will flow should be reviewable. In *Rochester Telephone Corporation* v. *United States* (1939), 307 U. S. 125, an order merely holding that a telephone company was under an agency's jurisdiction was held reviewable. In *Pennsylvania Railroad Co.* v. *United States*, 363 U. S. 202, where the Commission had given an advisory opinion to the Court of Claims as to the validity of certain freight charges, this court held such an opinion was reviewable (205). In *Panhandle Eastern Pipeline Co.* v. *Public Service Commission of Indiana*, 332 U. S. 507, 512, it is stated:

> "• • • Here the orders constituted 'an unequivocal assertion of power' to regulate rates and service. Indeed they involve something more than a mere threat to apply the regulatory plan in its later phases. *They represent the actual application of that plan in its initial stage.* In such a situation appellant was not required to await a further regulatory order before contesting the Commission's jurisdiction. • • •" (Italics ours.)

Also, *C. B. S.* v. *United States*, 316 U. S. 407, 417, 418; *El Dorado Oil Works* v. *United States*, 328 U. S. 12, 18 and 19.

Even in court proceedings, the rule of finality is applied despite ancillary or tributary proceedings to follow. *Brown Shoe Company* v. *United States*, 370 U. S. 294, 308, held a lower court decree to be final in an antitrust action where the lower court retained jurisdiction to supervise the plan of divestiture. Here, the ultimate result is the

divestiture of the Evansville Line by the C&EI and the acquisition thereof by the L&N. There, as here, the appellant attacked the divestiture (308, 309) and not the details or plan of such divestiture. The court held that the decree still to be entered necessitated careful negotiation and formulation requiring buyers and bankers to accomplish the forced sale, and observed "* * * This process does not take place in a vacuum, * * *". (309) The highly comparable situation in *Brown Shoe* to the case at bar is distinguished only by the fact that here the injury to Monon is complete regardless of the details of the subsequent sale or even gift of the Evansville Line to the L&N while there *Brown* had a direct financial interest in the later sale. It is in this proceeding where the damage will be done to the Monon and where the public interest issue is involved.

E.

Res Judicata Prevents the Later Modification of the Order Herein.

Only the Commission still contends that the doctrine of *res judicata* does not apply, a point upon which the prematurity argument was bottomed in the lower court. When Commission authority is granted to a railroad in an adversary proceedings, the doctrine of *res judicata* applies and the Commission is powerless to later modify such authority. *United States* v. *Seatrain Lines*, 329 U. S. 424, 432, 433, reaffirmed in *Civil Aeronautics Board* v. *Delta Airlines* (1961), 367 U. S. 316, 328. The Commission is without the power to later change its order herein approving the L&N acquisition as being in the public interest.

F.

Protection Should Be Granted Herein to Monon.

5(2) (b) specifically requires that the Commission shall impose just and reasonable terms before approving the transaction as in the public interest. If protection to the Monon now being proffered (Com., p. 14; L&N, p. 14; Leighton, p. 15) is anything more than counsel's post hoc rationalizations to sustain the present order, such protection should be spelled out herein as a prerequisite to the finding that such acquisition is in the public interest. No fact nor reason is advanced why the protection now indicated was not afforded Monon herein instead of a later proceeding where the Monon may not even receive a hearing.

G.

Monon Is Not Seeking Prejudgment—It Has Already Been Judged.

Monon is not asking prejudgment of any later 5(2) hearing if any in fact is granted to the Monon—it is seeking review of a determination that has been made herein which is of utmost gravity to Monon. Further, if denied relief herein, Monon will be irretrievably prejudged in any later hearing. In *Ashbacker Radio Corporation* v. *Federal Communications Commission,* 326 U. S. 327, Fetzer, and then Ashbacker, applied for a radio broadcasting permit for the same location. The Communications Commission granted Fetzer's application without a hearing on Ashbacker's application. Ashbacker appealed. This court, in reversing, held (332) that legal theory is one thing, practicalities are different. The court further stated (334):

> "* * * While the statutory right of petitioner to a hearing on its application has in form been preserved, it has as a practical matter been substantially nullified by the grant of the Fetzer application."

There, Ashbacker was in a sense a bystander; here, Monon was an active participant in the proceedings and should not be forced to retry this case in the hope of overcoming the almost impossible burden of the prejudgment herein.

II.

NO FINDINGS WERE MADE AS TO MONON.

Only the L&N's brief now contends that adequate findings were made as to the Monon. It is inconsistent to first argue that the public interest issue has not been determined as to Monon and will be determined in the later 5(2) proceedings and to then contend that adequate findings were made as to Monon herein. If adequate findings were made Monon is entitled to review of those findings.

L&N cannot point to one finding where the Commission considered Monon's evidence and explained why public interest required the L&N acquisition despite the damage to Monon. By contrast, the evidence of the other competitive railroads was minutely examined in the report (App. 49a to 54a, *Diversion of Traffic*).

The majority opinion refused to pass upon the lack of findings (App. 26a). Chief Judge Campbell flatly stated that Monon's evidence was ignored (App. 33a). Seizing the latter statement, L&N attempts to show that Monon's evidence was considered because some excerpts of Monon's evidence as recited in the Examiner's Report were included as an appendix to the Commission's Report (L&N, p. 6).[8] Monon is entitled to more than arguments that its evidence was considered—Monon is entitled to findings as to the issue involved. Further, the Examiner denied the L&N the right to purchase the Evansville Line (Examiner's Report 124; Commission's comment App. 67a). Therefore,

8. Later, L&N characterized these excerpts as the Commission's report.

no findings as to public interest were made by the Examiner and none are available for adoption by the Commission.

L&N, ignoring the evidence (including L&N's study showing a loss to Monon of $567,000 per year in revenue), contends that there are five factors which were the basis for the Commission's final conclusion (L&N pp. 7 to 9). These factors are not findings on Monon's evidence and have no application to Monon. They, in fact, affirmatively demonstrate the damage that will result to Monon.[9]

All these conjectural arguments of counsel are not findings and serve to emphasize the failure of the Commission to make essential findings.

> "• • • If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled

9. As to factor 1, there is no electronic yard at Louisville. (The Commission erroneously so reported (App. 64a). The Examiner stated only that it was contemplated (App. 161a)). Monon now receives at Louisville for shipment to Chicago railroad cars from the L&N which have been gathered from its large system. Obviously, L&N would not continue to deliver such cars to Monon when it has its own direct line to Chicago because of the loss of revenue and the extra expense. This is true regardless of the yard in Louisville. (Please compare Examiner's Report, 94, 95.) As to factor 2, because over 90 per cent of the traffic is shipper routed, this is the very reason why Monon will lose traffic to a faster single line haul. As to factor 3, no explanation is given of how Monon, half the size of the C&EI, which is admittedly a weak railroad, could possibly have any retaliatory power against L&N. As to factor 4, traffic conditions merely afford Monon an opportunity to compete but Monon will be unable to compete. Factor 5 is not quoted in full. When the part omitted is supplied, viz. "Particularly those (railroads) serving territories west and north of Chicago" (App. 64a), it is demonstrated that Monon will be precluded from all this traffic to Chicago in which it is now participating. Undoubtedly, this is some of the traffic which L&N frankly admits it is seeking to recapture by acquiring the line (App. 59a). (Also compare Leighton brief, pp. 11 and 12, showing plight of C&EI as a small railroad.)

> to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.' * * *'' *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, 196, 197. Also, *Burlington Truck Lines* v. *U. S.* (1962), 371 U. S. 156, 167, et seq.

This rule applied to Commission orders long before the Administrative Procedure Act of 1946. *Baltimore and Ohio Railroad Co.* v. *United States* (1924), 264 U. S. 258, 265 (Brandeis); *United States* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Co.* (1935), 294 U. S. 499, 510, 511 (Cardozo).

CLARIFICATION OF CERTAIN OF APPELLEES' STATEMENTS.

Like L&N (L&N, p. 5), Monon also had shippers and civic organizations who testified to their deep concern if Monon's services were to end or were further curtailed (Examiner's Report 96). The Commission order ''established the immediate right'' (Monon J. S., p. 9) to the temporary use of the Evansville Line by L&N pending the acquisition (App. 68a). Appellees (Com., p. 13; L&N, p. 10) do not deny that the right has been established but argue about the details preceding the use by L&N, which details could be quickly completed by agreement of the parties.[10]

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10. The affidavit filed in the District Court in support of L&N's disavowal to immediately use the line was limited to ''during the pendency of the case in the Federal District Court''. Monon accepts L&N's present disavowal (L&N, p. 10).

CONCLUSION.

Because the Commission's authority is only permissive, mergers and control proceedings must necessarily originate with the railroads involved resulting in a haphazard pattern. Despite the protests of the small railroads having little attraction to other railroads for merger purposes, the mergers are approved as in the public interest because of the valuable benefits to the larger railroads involved; however, in the process, the revenues of the small railroads are eroded with ultimate abandonment or reduced service as their fate resulting in communities and shippers being deprived of service or adequate service.[11]. With the many railroad mergers pending, this problem is national in scope. The procedures of the Commission should encompass methods to prevent the raiding of the revenues of such small railroads as a concomitant to such mergers. At the very least, the Commission should afford to these small railroads every legal right contemplated by Congress. It is respectfully contended that Monon is entitled to the

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11. The predicament of the Monon is graphically set forth in *Penn-Central Merger Proceeding,* 327 I. C. C. 475, at pages 537 to 540. The trackage rights under (d) (539), which C&O agreed to give to Monon, were denied to Monon by the hearing examiner in Finance Docket No. 23918 on October 25, 1966. As to (a) (538), *Monon Railroad Construction and Operation,* 324 I. C. C. 208, that proceeding involved two docks, one at each end of the Monon Railroad, to connect the Ohio River and the Great Lakes for which the Commission made funds available in Finance Docket No. 21551 (p. 211) through a guaranteed loan. When Monon sought authority to connect the docks with its main line, nine railroads first appeared and objected. As stated in one of the dissents (240), this was a unique service not being furnished. Despite the fact that after five years of operation the projected volume of revenue would be less than one-quarter of one per cent of the gross revenues of only four out of the nine protesting railroads (239), Monon was denied permission to connect to the dock facilities on the ground that such operation would weaken the competitive carriers (236).

minimal protection here of an adequate consideration by the Commission of its evidence and adequate findings thereon. Probable jurisdiction should be noted.

Respectfully submitted,

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